

8/3/90

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

US EPA RECORDS CENTER REGION 5



) Civil Action
) No. 8-79-556
) Third-Party
) Complaint

NORTHWEST SOLVENT RECOVERY INC.;
NORTHWEST INDUSTRIAL WASTE DISPOSAL
COMPANY, INC.; INDUSTRIAL TECTONICS,
INC.; V & F CORPORATION; ERNEST DE
HART; EDWARD D. CONLEY; MELBA C.
CONLEY; LOUIE DE HART; CHARLES A.
LIGHT; DAVID E. LIGHT; DELORES LIGHT;
EUGENE KLISIAK; JEANETTE KLISIAK;
LUTHER G. BLOOMBERG; ROBERT J. DAW-
SON, JR.; JOHN MILETICH; MARY
MILETICH; PENN CENTRAL CORPORATION;
INSILCO CORPORATION; RUST-OLEUM, INC.;
ZENITH RADIO CORPORATION; STANDARD T
CHEMICAL COMPANY, INC.; AMERICAN CAN
COMPANY, INC.; PRE FINISH METALS, INC.;
PREMIER COATINGS, INC.; MOTOROLA, INC.;
AND DESOTO, INC.;

Defendants.

AMERICAN CAN COMPANY, INC.,
DESOTO, INC., INSILCO CORPORATION,
MOTOROLA, INC., PRE FINISH METALS,
INC., PREMIER COATINGS, INC.,
RUST-OLEUM, INC., STANDARD T
CHEMICAL COMPANY, INC.,
ZENITH RADIO CORPORATION, JOHN
MILETICH, MARY MILETICH and THE
PENN CENTRAL CORPORATION,

Third-Party Plaintiffs.

vs.

ACCUTRONICS, ACTIVE SERVICE CORP.,
AMERICAN NAMEPLATE & DECORATING CO.,

1	AMERICAN PRINTER & LITHOGRAPHER CO.,)
	AMERICAN RIVET COMPANY, APECO,)
2	APPROVED INDUSTRIAL REMOVAL, INC.,)
	ARMOUR PHARMACEUTICAL, ARTISAN HAND)
3	PRINTS, ASHLAND CHEMICAL CO.,)
	AVENUE TOWING COMPANY, BARD &)
4	WILES, INC., BELDEN ELECTRICAL)
	PRODUCTS DIV. OF COOPER INDUSTRIES,)
5	INC., BRETFORD MANUFACTURING, INC.,)
	BUTLER SPECIALTY COMPANY, INC.,)
6	BY PRODUCTS MANAGEMENT, CALUMET)
	CONTAINER, CARGILL, INC.,)
7	CHEMALLOY DIVISION OF FISHER- CALO)
	CHEMICAL CO., CHICAGO ETCHING CORP.,)
8	CHICAGO NAMEPLATE COMPANY,)
	CHICAGO POTOPRINT CO.,)
9	C & C INDUSTRIAL MAINTENANCE CORP.,)
	CITY OF GARY, INDIANA, C.P. CLARE)
10	DIVISION OF GENERAL INSTRUMENTS)
	CORP., C.P. BALL CO.,)
11	C.P. INORGANICS, COMMANDER PACKAGING,)
	CONNOR FOREST INDUSTRIES, CONSERVA-)
12	TION CHEMICAL, CONSUMERS PAINT)
	FACTORY, INC., CONTINENTAL)
13	WHITE CAP DIVISION OF CONTINENTAL)
	CAN COMPANY, CONVERSIONS BY GERRING,)
14	COUNTY OF DU PAGE, ILLINOIS,)
	CROWAMP, INC., CROWN CORK & SEAL)
15	CO., INC., CULLIGAN INTERNATIONAL)
	COMPANY, CULLIGAN WATER CON-)
16	DITIONING, INC., FRANK J. CURRAN,)
	CUSTOM METALS PROCESSING,)
17	DAP, INC. OF DEECHAM COSMETICS,)
	DAUBERT CHEMICAL COMPANY,)
18	DEUBLIN COMPANY, DORSON CONSTRUCTION)
	INC., DUO FAST CORPORATION, DU-TONE)
19	CORP., HAROLD EGAN, EKCO HOUSEWARE)
	CO., EL-PAC, INC., EMROSOGRAPH DIS-)
20	PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
	ETHICON, INC., FELT PRODUCTS MFG. CO.,)
21	FLINT INK CORP., FURNAS ELECTRIC)
	CO., GFARMASTER DIVISION, EMERSON)
22	ELECTRIC, THE GILBERT & BENNETT)
	MFG. CO., GLD LIQUID DISPOSAL,)
23	HENRY PRATT COMPANY, J.M. HUBER)
	CORPORATION, HYDRITE CHEMICAL CO.,)
24	INTAGLIO CYLINDER SERVICE, INC.,)

1	JOHNSON & JOHNSON, J & S TIN MILL)
	PRODUCTS, KNAACK MFG. CO., LANSING)
2	SERVICE CORPORATION, LAUTTER)
	CHEMICAL, LIQUID DYNAMICS,)
3	LIQUID WASTE, INCORPORATED,)
	STEVE MARTEL, NASONITE CORPO-)
4	RATION, MCWHARTER CHEMICAL CO.,)
	METAL RECLAIMING CORPORATION,)
5	METROPOLITAN CIRCUITS,)
	MIDWEST RECYCLING COMPANY, MONTGOMERY)
6	TANK LINES, NORTON THIOLY INC.,)
	MR. FRANK, INC., NANSO, INC.,)
7	NATIONAL CAN CORPORATION, NAZ-DAR CO.,)
	NUCLEAR DATA, INC., PPG INDUSTRIES,)
8	INC., PASLODE COMPANY, PIERCE & STEVENS)
	CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
9	PREMIER PAINT CO., PYLE-NATIONAL CO.,)
	R-LITE, REFLECTOR HARDWARE CORP.,)
10	REGAL TWP, RELIANCE UNIVERSAL, INC.,)
	RICHARDSON GRAPHICS, JOHN ROSCO,)
11	ROZEMA INDUSTRIAL WASTE, ST. CHARLES)
	MANUFACTURING, SCHOLLE CORPORATION,)
12	SCRAP HAULERS, SHERWIN WILLIAMS)
	COMPANY, SIELD COATINGS, INC.,)
13	SIZE CONTROL COMPANY, SKIL CORPORA-)
	TION, SPECIAL COATINGS CO.,)
14	SOUTHERN CALIFORNIA CHEMICAL,)
	SPECIALTY COATINGS, INC.,)
15	SPOTNAILS, INC., STAR TRUCKING, STEPH)
	ELECTRONICS, INC., JOE STRAUSNICK,)
16	STUART CHEMICAL & PLANT, INC.,)
	SUMNER & MACE, SUN CHEMICAL,)
17	SYNTECH WASTE TREATMENT CENTER,)
	T.R.C., TERPACK, INC., ALFRED TENNY,)
18	THIELER-ENGDAHL, INC., THOMPSON)
	CHEMICALS, TIFFT CHEMICALS,)
19	TOUNEY DISPOSAL, TRIPLE S. FUCHANTS,)
	UNIROYAL, INC., UNITED RESIN AD-)
20	RESINES, INC., U.S. ENVELOPE, U.S.)
	SCRAP AND DRUM, U.S. STEEL CORP., UNI-)
21	VERSAL RESEARCH LABORATORIES, INC.,)
	UNIVERSAL TOOL & STAMPING COMPANY,)
22	VANDER MOULEN DISPOSAL, VELSICOL)
	CHEMICAL CORP., VICTOR GASKET)
23	DIVISION OF DANA CORPORATION,)
	WARNER ELECTRIC BRAKE & CLUCH CO.,)
24	WARWICK CHEMICAL, WASTE RESEARCH &)

1 RECYCLING, XEROX CORPORATION, and)
2 other unidentified persons,)

3 Third-Party Defendants.)
4
5
6
7

8 DEPOSITION OF RICHARD E. BOICE

9 August 3, 1990
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

1
2
3
4
5
6 The continued deposition of RICHARD
7 EDWIN ROICE, called for examination by the
8 Defendants, pursuant to notice and pursuant
9 to the provisions of the Federal Rules of
10 Civil Procedure of the United States
11 District Courts, pertaining to the taking
12 of depositions for the purpose of
13 discovery, taken before Arnold W.
14 Goldstine, a Notary Public and Certified
15 Shorthand Reporter within and for the
16 County of Cook and State of Illinois, at
17 227 West Monroe Street, on August 3, 1990,
18 commencing at the hour of 9:00 o'clock a.m.
19
20
21
22
23
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

APPEARANCES:

Mr. Alan S. Tenenbaum and
Mr. Leonard M. Gelman
Trial Attorney
Environmental Enforcement Section
Land & Natural Resources Division
U.S. Department of Justice
P. O. Box 7611
Ben Franklin Station
Washington, D. C. 20044

-and-

Mr. Michael R. Berman
Assistant Regional Counsel
Solid Waste & Emergency Response Branch
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

-and-

Peter W. Moore
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
Office of Regional Counsel
230 South Dearborn Street
Chicago, Illinois 60604

appeared on behalf of Plaintiff,
United States of America;

1 **APPEARANCES (CONTINUED);**

2
3 Mr. Michael P. Plankshain
4 Wildman, Harrold, Allen & Dixon
5 225 West Wacker Drive
6 Chicago, Illinois 60606-1229

7 appeared on behalf of
8 Penn Central Corporation;

9 Mr. Robert M. Olian
10 Sidley & Austin
11 One First National Plaza
12 Chicago, Illinois 60603

13 appeared on behalf of
14 Pro Finish Metals, Inc.;

15 Mr. Jeffrey C. Fort and
16 Mr. Carl B. Hillemann
17 Sonnenschein Nath & Rosenthal
18 One Mercantile Center
19 Suite 2600
20 St. Louis, Missouri 63101

21 appeared on behalf of
22 Desoto, Inc.;

23 Mr. Joseph V. Karaganis
24 Karaganis & White, Ltd.
 414 North Orleans Street
 Chicago, Illinois 60610

 appeared on behalf of
 American Can Company, Inc.;

APPEARANCES (CONTINUED):

Mr. James T. J. Keating
Law Offices of James T. J. Keating, P.C.
Printers Row
542 South Dearborn Street
Chicago, Illinois 60605

appeared on behalf of
Premier Coatings, Inc.;

Mr. Edward J. Leahy
Leahy, Eisenberg & Fraenkel, Ltd.
309 West Washington Street
Chicago, Illinois 60606

appeared on behalf of
Scholle Corp.;

Mr. Craig Zimmerman
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606-5096

appeared on behalf of Standard T
Chemical Company;

1 **APPEARANCES (CONTINUED):**

2
3 Mr. Daniel E. Fritz
4 Taylor, Miller, Sprowl, Poffnagle &
5 Marletti
6 33 North LaSalle Street
7 Chicago, Illinois 60602-2602

8 appeared on behalf of Third-
9 Party Plaintiffs Desoto, et al.
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

I N D E X

WITNESS:

RICHARD E. BOICE

Direct Examination by:

Mr. Karaganis: 1947

Mr. Fort: 2097

Mr. Lustgarten: 2166

Mr. Leahy: 2177

E X H I B I T S

Boice Deposition Nos.

54 2037

55 2161

1 MR. KARAGANIS: Let the record show that
2 there is the resumption of the deposition of Mr.
3 Richard Boice pursuant to notice and agreement.

4 RICHARD E. BOICE

5 having been previously duly sworn,
6 was examined and testified further as follows:

7 DIRECT EXAMINATION

8 (CONTINUED)

9 BY MR. KARAGANIS:

10 Q. Mr. Boice, I believe there was a
11 question pending yesterday.

12 Mr. Boice, we spoke yesterday of the
13 December 22, 1983 memorandum by Mr. Adamkus,
14 which had attached to it the Midco I
15 endangerment assessment, and there was also I
16 believe a Midco II endangerment assessment; or,
17 certainly the memorandum by Mr. Adamkus had both
18 Midco I and Midco II on it, did it not?

19 A. That's correct.

20 Q. Okay.

21 Was that endangerment assessment
22 followed by litigation seeking to abate the
23 imminent and substantial endangerment that was
24 addressed in Mr. Adamkus' memorandum?

1 A. I know there was litigation sometime
2 during that period, but I don't know anything
3 about it.

4 MR. TENENBAUM: I have to object to the
5 extent you are asking for a legal conclusion as
6 to what the litigation involved.

7 MR. KARAGANIS: Let's turn, if we can, to
8 the --

9 MR. TENENBAUM: I don't know that it has
10 anything to do with what your question is about.

11 MR. KARAGANIS: Yes, it does. It relates to
12 the endangerment assessment and certification
13 that was in December of 1983.

14 Q. What, if anything, was done to abate
15 the endangerment found in Mr. Adamkus'
16 determination?

17 MR. TENENBAUM: I think the question -- I
18 can let you answer that question without
19 objection, to the extent that it asking what
20 costs are we seeking to recover for -- well, the
21 costs recovered.

22 What cost are we seeking to recover or,
23 subject to my objection, that we have already
24 recovered. If you want to answer that, that

1 will be fine.

2 If you are seeking a determination by
3 this witness as to whether a particular step is
4 a step designed to deal with a particular
5 imminent substantial endangerment, then I think
6 you are asking for an expert conclusion as well
7 as a legal opinion, as well as getting into the
8 record issue, perhaps.

9 MR. KARAGANIS: Mr. Tenenbaum, in December
10 of 1983 an official of the United States
11 Environmental Protection Agency apparently
12 without any evidence declared the existence of
13 an imminent and substantial endangerment.

14 The process that we are about to
15 undertake shows that the United States
16 government then went in front of Judge Moody's
17 predecessor and presented their claims with
18 respect to an imminent and substantial
19 endangerment, and ultimately reached a cash
20 settlement with the United States and a
21 determination as to whether or not any action
22 was needed to be taken to address the
23 endangerment.

24 This is not an administrative record

1 matter. This is a matter that has been in front
2 of the Federal District Court and it relates to
3 what costs were paid and what agreement was
4 struck to address endangerment.

5 MR. TENENBAUM: I can't agree.

6 Of course, I am not agreeing or
7 disagreeing with whatever you just said because
8 I don't understand what you said. But, this
9 witness has said he doesn't know what happened
10 in the litigation. So, I don't think -

11 MR. KARAGANIS: That isn't the question,
12 Alan.

13 The question is what was done to
14 respond or to take action following Mr. Adamkus'
15 determination of endangerment.

16 MR. TENENBAUM: I am going to have to object
17 to the question.

18 You are asking the witness to make a
19 determination as to which of RPA's costs,
20 removal costs, in this case we are addressing.

21 MR. KARAGANIS: This is not a removal cost.
22 This is a cost that was undertaken, and I take
23 it time was involved in it, both in the
24 preparation of the endangerment assessment and

1 in the preparation of determinations as to what
2 was necessary to abate the endangerment.

3 You will find -

4 MR. TENENBAUM: As to cost, he can answer,
5 but as to any grandiose questions about
6 litigation --

7 MR. KARAGANIS: It is not grandiose
8 questions. I am asking a simple question, Mr.
9 Tenenbaum.

10 Q. Mr. Boice, what was done to abate the
11 endangerment that was found by Mr. Adamkus in
12 1983?

13 MR. TENENBAUM: That is not an appropriate
14 question, because you are asking the witness to
15 form an expert opinion as well as a legal
16 conclusion as to which of whatever was done was
17 addressing an imminent and substantial
18 endangerment.

19 MR. KARAGANIS: Your objection is noted.

20 MR. TENENBAUM: It also may be getting into
21 a record issue.

22 BY MR. KARAGANIS:

23 Q. Go ahead, Mr. Boice.

24 MR. TENENBAUM: I will have to instruct the

1 witness that he may answer only to the extent to
2 describe various EPA costs that we may be
3 seeking to recover or may have been recovered
4 already.

5 MR. KARAGANIS: As well as actions, we are
6 looking for facts here. We are not looking for
7 opinion or anything else. We are looking for
8 facts.

9 Q. What was done to address the
10 endangerment found by Mr. Adamkus in 1983?

11 MR. TENENBAUM: Please limit your answer to
12 whatever may have been undertaken, for which we
13 are seeking costs.

14 Again I object to the attempt to
15 inquire and get the witness to render an expert
16 opinion as well as a legal conclusion as to
17 whether a particular cost item was designed to
18 meet some legal standard.

19 BY MR. KARAGANIS:

20 Q. Go ahead Mr. Boice.

21 A. As I have already stated in previous
22 testimony, following this endangerment
23 assessment that there was negotiations with
24 responsible parties to take actions at the site.

1 **There was --**

2 Q. Go ahead, I am sorry.

3 A. We prepared a remedial action master
4 plan. We, I should say, yes, our contractor
5 prepared a work plan for the remedial
6 investigation feasibility study.

7 Q. That was separate than the remedial
8 action master plan?

9 A. Yes.

10 Q. Okay.

11 A. And that was approved by the Agency.

12 And we initiated the remedial
13 investigation feasibility study at both sites to
14 determine the extent of contamination remaining
15 at the site and evaluate any hazards that
16 remained at the site.

17 Q. Okay.

18 Would you please recover from the
19 record the endangerment assessment, which is
20 dated 12-22-83?

21 A. Sure.

22 Q. That is Mr. Adamkus' certification.

23 In that same record, if you would, I
24 believe it is in the same box, also on January

1 10, 1984 there should be a record item with
2 regard to the first amended complaint by the
3 United States filed January 10, 1984.

4 A. What is the date of the first one?

5 Q. 12-22-83.

6 A. What is the other one?

7 Q. It is an item first amended complaint
8 dated January 10, 1984.

9 A. Okay.

10 Q. Do you have it?

11 A. Yes.

12 Q. All right.

13 May I have them, please. Thank you.

14 Would it be an accurate statement, Mr.
15 Noice, that the December 22, 1983 action by Mr.
16 Adamkus was the prelude to the filing of an
17 amended complaint by the United States in
18 January of 1984?

19 MR. TENENBAUM: Objection.

20 This witness was not employed by the --
21 not working on this case at that time. How
22 would he know?

23 BY MR. KARAGANIS:

24 Q. If you know.

1 A. Well, obviously it was prepared before
2 that. That's all I can say.

3 Q. Are you familiar with the process of
4 using an endangerment assessment and finding as
5 a basis for referral for a Section 106 case?

6 MR. TENENBAUM: Objection. Calls for a
7 legal conclusion, no foundation as to this
8 witness.

9 BY MR. KARAGANIS:

10 Q. Go ahead.

11 A. Since we used it on this case, that's
12 the extent of my understanding is what
13 experience I have had in issuing the unilateral
14 administrative orders which became effective on
15 January 29, 1989.

16 Q. Was there a --

17 A. December 29, 1989.

18 MR. KARAGANIS: Off the record.

19 (Discussion had off the record.)

20 Back on the record.

21 Q. Was an endangerment assessment similar
22 to the December 22, 1983 endangerment assessment
23 done prior to the December 1989 unilateral
24 administrative order?

1 MR. TENENBAUM: Object, seeks discovery on
2 record issues.

3 But, subject to my objection, you can
4 try and answer.

5 A. I don't know what you mean by similar.

6 BY MR. KARAGANIS:

7 Q. Well, you are familiar with the
8 endangerment assessment that was issued December
9 22, 1983.

10 Was an endangerment assessment to
11 provide the factual and analytical basis for a
12 claim of endangerment done prior to the
13 unilateral administrative order in December of
14 '89?

15 MR. TENENBAUM: Same objection.

16 A. Yes.

17 The technical evaluation was -- of
18 course, following the remedial investigation we
19 had much more detailed information. And so we
20 had that technical evaluation of the extent of
21 hazard at both sites, like we did on December
22 22, 1983.

23 Q. Well, now, was the only additional
24 basis the technical evaluation and the remedial

1 investigation or was there additional technical
2 evaluation?

3 MR. TENENBAUM: Same objection.

4 We are taking discovery into the
5 finding of limited substantial endangerment now.

6 MR. KARAGANIS: I am just trying to find out
7 whether there is any additional evidence that is
8 supporting the ultimate endangerment, other than
9 the PI.

10 MR. TENENBAUM: I am going to have to
11 instruct the witness not to --

12 You want the witness to say whether or
13 not the Agency's finding of imminent substantial
14 endangerment, what was that based on is what
15 your question is?

16 MR. KARAGANIS: No.

17 What I am asking is if he can point out
18 to me in the record, he said the PI and the PS
19 were a factual basis.

20 Simply, so there is not a misleading
21 statement later on cross examination, I want to
22 find out if there is anything else. I believe
23 there was. I am not trying to play any games.
24 I am just trying to get it clear for the record.

1 MR. TENENBAUM: All right.

2 Well, subject to my objection, you can
3 answer.

4 A. There was an evaluation that was
5 attached as part of the unilateral
6 administrative order.

7 BY MR. KARAGANIS:

8 Q. Was that the acute risk assessment?

9 A. That's correct.

10 Q. Okay.

11 So would it be a fair statement that
12 you had the RI, the PS and the acute risk
13 assessment, in addition to the material that had
14 been in existence at the time Adamkus gave his
15 endangerment assessment in '83?

16 A. That's correct.

17 BY MR. TENENBAUM: Well, that is --

18 MR. KARAGANIS: I am just trying to get the
19 information.

20 MR. TENENBAUM: Again, I object to this as
21 discovery on a record issue.

22 BY MR. KARAGANIS:

23 Q. Now --

24 MR. BLANKSHAIN: Was there an answer to your

1 last question, Joe?

2 MR. KARAGANIS: Yes. He can read it back.

3 MR. BLANKSHAIN: That's all right.

4 BY MR. KARAGANIS:

5 Q. With respect to the first amended
6 complaint that was filed, what technical relief
7 was sought to abate the imminent and substantial
8 endangerment found in December of 1983 for the
9 Midco I site?

10 MR. TENENBAUM: Same objections and
11 instructions as earlier. Please limit your
12 answer to costs covered.

13 A. I would have to read the document.

14 BY MR. KARAGANIS:

15 Q. All right.

16 A. But I don't know how this would have
17 anything to do with cost recovery.

18 A. It may be better for a lawyer to
19 interpret this.

20 But, generally --

21 MR. TENENBAUM: Is this a question asking
22 him to interpret this document?

23 MR. KARAGANIS: If he needed to review the
24 document, fine.

1 I am trying to find out what work, what
2 response was demanded by the government after
3 the December 22, 1983 finding of an imminent and
4 substantial endangerment. What response was
5 demanded by the government of the respondents or
6 the defendants in this case to abate the
7 imminent and substantial endangerment at Midco
8 I.

9 MR. TENENBAUM: When you say that, there is
10 a little bit of a confusion built into your
11 question. First you say that there was an
12 imminent substantial endangerment found at the
13 site. Then you say what response was required
14 to abate the imminent and substantial
15 endangerment at the sites.

16 MR. KARAGANIS: Site.

17 MR. TENENBAUM: Or at the site.

18 MR. KARAGANIS: I am dealing now with Midco
19 I only.

20 MR. TENENBAUM: Site.

21 Now, in that question do you mean to be
22 focusing just on the particular imminent and
23 substantial endangerment that was referenced in
24 '83 or any imminent and substantial endangerment

1 in general?

2 MR. KARAGANIS: I am talking about simply
3 Mr. Adamkus' nice finding in December of 1983
4 that the Midco I site may present an imminent
5 and substantial endangerment.

6 What response was demanded by the
7 government to abate that imminent and
8 substantial endangerment. Yes.

9 MR. TENENBAUM: I think that is an
10 objectionable question, as I have indicated
11 earlier.

12 But, if you know the answer without
13 speculating, subject to my objection, try and
14 answer it.

15 Again, we are talking about only the
16 '83 imminent and substantial endangerment. That
17 was the question.

18 A. Okay.

19 Page 30 of the first amended complaint
20 by the United States filed with the Northern
21 District Court of Indiana includes a prayer for
22 relief, it goes to page 32. And it includes the
23 following.

24 "Wherefore, the

1 plaintiff, United States of
2 America, prays as follows:

3 A. That the court
4 issue an injunction
5 requiring defendants jointly
6 and severally to do the
7 following:

8 1. Cease and
9 desist and refrain from all
10 activities relating to
11 handling, treatment, storage
12 or disposal of hazardous and
13 solid waste and hazardous
14 substances at the Midco
15 sites --"

16 Q. Okay.

17 A.

18 " -- except as
19 provided herein.

20 2. Formulate and
21 submit to USEPA a plan for
22 the removal of solid and
23 hazardous wastes and
24 hazardous substances from

1 the Midco sites consistent
2 with all applicable
3 regulations and for the
4 proper disposal of that
5 solid and hazardous waste
6 and hazardous substances,
7 which plan shall meet the
8 requirements and be subject
9 to the approval of the
10 USEPA.

11 3. Expeditionously
12 remove all solid wastes,
13 hazardous waste and
14 hazardous substances stored
15 on the surface of the Midco
16 sites in accordance with the
17 approved plan.

18 4. To the extent
19 not already implemented by
20 USEPA, formulate and submit
21 to USEPA plans for the
22 investigation of the nature
23 and extent of contamination
24 of soil and groundwater and

1 for the abatement of such
2 contamination. Such plan
3 shall be consistent with all
4 applicable regulations and
5 be subject to the approval
6 of USEPA.

7 5. Expeditiously
8 implement all abatement
9 activities relating to soil
10 and groundwater
11 contamination at the Midco
12 sites in accordance with the
13 approved plans."

14 And the rest relates to other matters,
15 not to remedial actions.

16 Q. Would it be a fair statement that,
17 again, based on your knowledge of the Superfund
18 program and the regulatory structure, that the
19 elements called for or planned for the
20 preparation and submission of a plan for removal
21 and then the expeditious implementation of the
22 removal of surface wastes, related to the use of
23 the term removal as that term is used in the
24 CRRCLA program?

1 MR. TENENBAUM: Off the record for a second.

2 (Discussion had off the record.)

3 MR. KARAGANIS: Let's go back on the record.

4 Q. Mr. Noice, I take it from what you
5 read, you read it literally; but, let's see if
6 it can do it from a layman's standpoint.

7 The relief that was requested by the
8 government to deal with the December 22 finding
9 of an imminent and substantial endangerment was,
10 one, that the defendants should desist and
11 refrain from dealing with hazardous wastes at
12 the Midco sites, is that right, that was number
13 one?

14 MR. TENENBAUM: Wait a second now.

15 You can read this as well as anyone can
16 read this.

17 MR. KARAGANIS: I am asking --

18 MR. TENENBAUM: I don't see why he needs to
19 interpret a legal document.

20 MR. KARAGANIS: I am not talking about a
21 legal document. I am talking about a fact
22 witness with respect --

23 Mr. Tenenbaum, I realize lawyers like
24 to have there tentacles in everything. But, the

1 fact is that there was a declaration by a
2 non-lawyer of an imminent and substantial
3 endangerment. Something very serious existed at
4 the Midco I site.

5 I take it there were demands made to
6 abate that endangerment, presumably. And I am
7 trying to find out what those demands were. Not
8 from a legal basis, from a technical basis.

9 What were the demands of the government
10 to abate the endangerment in 1984, right after
11 the December '83 finding.

12 MR. TENENBAUM: But built into that question
13 is a legal determination as to -- as well as an
14 expert opinion, as to which particulars of these
15 correspond to the 1983 findings that you
16 referred to.

17 MR. KARAGANIS: It is a factual question.

18 MR. TENENBAUM: Why is it a factual
19 question?

20 MR. KARAGANIS: What do you need to do to
21 abate the endangerment. Do we need a lawyer for
22 everything?

23 MR. TENENBAUM: Doesn't that require
24 expertise?

1 MR. KARAGANIS: No.

2 MR. TENENBAUM: Why doesn't take require --

3 MR. KARAGANIS: Does dealing with hazardous
4 wastes require an expert? Do you need to be a
5 rocket scientist to work that out? I think most
6 six-year olds can figure out when --

7 MR. TENENBAUM: Some expert questions are
8 easier than others, but they are still expert
9 questions.

10 MR. KARAGANIS: To prepare a plan and
11 implement the plan for removal of surface
12 hazardous wastes, does that require a rocket
13 scientist to figure that out?

14 MR. TENENBAUM: Whether it is easy for an
15 expert to render an opinion or difficult for an
16 expert to --

17 MR. KARAGANIS: I think Judge Moody and the
18 judge who originally had this case would be able
19 to figure that out. That makes common sense.

20 MR. TENENBAUM: You are still seeking to
21 take testimony on an issue that requires an
22 expert opinion.

23 MR. KARAGANIS: Your objection is noted.

24 Q. Are those five elements a fair

1 statement of what was being demanded of the
2 defendants?

3 A. I think the document speaks for itself.

4 Q. Let's deal with the question of was
5 there any demand at the time that there be an
6 immediate restriction of access to the site?

7 MR. TENENBAUM: Any demand in '84? He
8 wasn't there.

9 MR. KARAGANIS: Yes.

10 Q. Based on your information and knowledge
11 of the history of this case, was there any
12 demand made by the government in 1984 that the
13 defendants restrict access to the Midco I site?

14 MR. TENENBAUM: If you know, you may answer.
15 If you know.

16 A. All I know is it is not in this prayer
17 for relief. It is not specifically stated.

18 BY MR. KARAGANIS:

19 Q. Is there a demand anywhere to your
20 knowledge in the documents, either in or out of
21 the administrative indices that are in Boice
22 Deposition Exhibit No. 3, a demand at any time
23 by the government following the December 1983
24 endangerment declaration that the defendants

1 restrict access either by a fence or any other
2 means to the Midco I site?

3 MR. TENENBAUM: Object. It asks the witness
4 to answer based on seven years' worth of
5 documents. It is not a fair question.

6 BY MR. KARAGANIS:

7 Q. Go ahead.

8 A. What is the demand?

9 Q. A request. Anything, a note, a phone
10 call. Anything saying please put up a fence in
11 response to the December '83 endangerment
12 assessment.

13 MR. TENENBAUM: Didn't we already have some
14 testimony on that yesterday?

15 MR. KARAGANIS: No, not on this one.

16 A. I don't know about the response to the
17 '83 endangerment assessment.

18 All I know is I am not aware of any
19 request of that nature.

20 Q. All right.

21 Now, was there any request or demand of
22 any kind that the defendants provide alternative
23 water supply to any neighboring residents from
24 the Midco I site?

1 A. No. Because there was no -- we didn't
2 detect any contamination at nearby residences
3 that we thought were attributable to the sites.

4 O. All right.

5 So at the time those sites were not in
6 any immediate danger of contamination, is that
7 correct?

8 MR. TENENBAUM: I am going to have the
9 instruct the witness not to answer that
10 question. That's an imminent substantial
11 endangerment question, directly a record issue.

12 MR. KARAGANIS: Mr. Tenenbaum, he answered a
13 related question yesterday.

14 MR. TENENBAUM: I object to it.

15 What was the related question that he
16 answered?

17 MR. KARAGANIS: The related question that he
18 answered yesterday was that he haven't found any
19 evidence to this date of contamination at the
20 neighboring wells around Midco I.

21 A. That is what I said today.

22 BY MR. KARAGANIS:

23 O. All right.

24 MR. TENENBAUM: I am still going to object

1 to it, and any further questioning on it.

2 You have may have snuck through some
3 answer that I didn't object to.

4 MR. KARAGANIS: They are highly relevant,
5 Mr. Tenenbaum.

6 MR. TENENBAUM: They are record issues. You
7 are not entitled to take discovery on record
8 issues.

9 BY MR. KARAGANIS:

10 Q. Mr. Boice --

11 MR. TENENBAUM: I move to strike all answers
12 and questions on record issues.

13 MR. KARAGANIS: That's a global motion, I
14 take it.

15 Q. Mr. Boice, was there ever a demand or a
16 request that they put in something in addition
17 to the cover?

18 You indicated in your testimony
19 yesterday that a cover had been put on the Midco
20 I site in 1982.

21 Was there a demand by the government
22 that some additional cover be put on to address
23 the endangerment found in 1983?

24 MR. TENENBAUM: I am going to reiterate my

1 previous objections and also add to the
2 objection that I am not sure what the questioner
3 means by demand or request.

4 MR. KARAGANIS: Do you understand the words
5 demand or request?

6 MR. TENENBAUM: I am not sure whether or not
7 your question subsumes -- whether or not demands
8 or requests, how specific they have to be.

9 MR. KARAGANIS: Communication of any kind,
10 Mr. Tenenbaum, requesting or demanding that the
11 defendants in this case do anything other than
12 the cover that was already on the site to abate
13 the endangerment found in 1983.

14 MR. TENENBAUM: Same objection.

15 A. If you put it that way, I think it is
16 obvious from the amended complaint that we are.
17 Because, for one thing, you are supposed to
18 submit a plan for the removal of the solid and
19 hazardous waste from the Midco site.

20 So it doesn't specifically state you
21 have to put a fence around the site. But,
22 whenever you are doing a removal action, if
23 there wasn't --

24 I think there was already a fence

1 around both sites, at least around the Midco II
2 site.

3 Q. My questions have been only related to
4 the Midco I site, Mr. Boice.

5 A. Okay.

6 MR. TENENBAUM: Let him answer.

7 A. Naturally if you are doing a removal
8 action, you will put a fence around the site to
9 restrict access. That would be part of the
10 plan.

11 Also it says that they will
12 expeditiously implement all abatement actions,
13 activities relating to soil and groundwater
14 contamination at the Midco sites in accordance
15 with the approved plan.

16 And that plan, which would be basically
17 the result of your remedial investigation
18 feasibility study, could include a requirement
19 to install a fence around the site.

20 BY MR. KARAGANIS:

21 Q. I am simply asking, Mr. Boice, that as
22 a result of the '83 action, was there a specific
23 request for fencing the site?

24 You said previously there wasn't..

1 MR. TENENBAUM: He just clarified his
2 answer.

3 MR. KARAGANIS: I understand.

4 Q. But, you said previously there wasn't a
5 specific request; is that right?

6 A. That's correct.

7 Q. Was there a specific request on a
8 short-term basis at all of any kind to install
9 something more than the cover that was on the
10 site?

11 MR. TENENBAUM: Same continuing objection.

12 A. No. There wasn't a specific request to
13 that effect.

14 BY MR. KARAGANIS:

15 Q. Now, again, just for laymen, if there
16 is an immediate health problem out at any site,
17 isn't it normally the practice that either EPA
18 or people that EPA thinks are responsible will
19 be asked to do something immediately?

20 MR. TENENBAUM: I will have to object to
21 that as seeking discover on a record issue.
22 Unless you can tell me now it relates to a
23 non-record issue, I am going to have to instruct
24 him not to answer.

1 MR. KARAGANIS: It relates among other
2 things to the cost. We took care of the
3 emergencies, Mr. Tenenbaum, with a \$5 million
4 payment to the government. You are trying to
5 double --

6 MR. TENENBAUM: I don't know you say you
7 have taken care of, it was an emergency. But I
8 don't see why you think you took care of all
9 emergencies.

10 MR. KARAGANIS: Mr. Tenenbaum, in 1985 we
11 made a \$5 million payment. Certainly we took
12 care of the emergencies that existed as of 1985.

13 MR. TENENBAUM: How do you know that?

14 MR. KARAGANIS: Because you didn't ask us to
15 do any more.

16 MR. TENENBAUM: How do you know that?

17 A. We did.

18 We required you to do the RIFS and then
19 to implement the actions following the RIFS that
20 were selected in the record of decision.

21 BY MR. KARAGANIS:

22 Q. Mr. Boice, I am just trying to find out
23 as emergency health protection measures --

24 MR. TENENBAUM: I am going to have to object

1 to the emergency phrase as being very vague and
2 ambiguous.

3 MR. KARAGANIS: Your objection is noted.

4 Q. As to emergency health protection
5 matters, was anything demanded of the defendants
6 to abate any emergency health protection
7 situation or health risk situation as a result
8 of the December '83 endangerment plan?

9 A. At Midco I you mean?

10 Q. Yes.

11 A. No.

12 The only request was to -- or the
13 negotiation was to conduct a remedial
14 investigation feasibility study of the remaining
15 contamination in the subsurface soils and the
16 groundwater.

17 Q. All right.

18 A. And to address those.

19 Q. So I am correct, then, that nothing was
20 demanded of an emergency nature in terms of
21 action to abate an emergency threat --

22 MR. TENENBAUM: Same objection.

23 BY MR. KARAGANIS:

24 Q. -- at Midco I?

1 A. Not as far as any time-critical action.

2 Q. So my statement is correct?

3 A. Yes.

4 Q. Now, your Exhibit C-I ends at 1984.

5 You indicated that you had undertaken a remedial
6 investigation -- you, the Agency, had undertaken
7 a remedial investigation at Midco I?

8 A. At what time?

9 Q. In 1984.

10 A. No, we hadn't.

11 Q. When did you undertake the remedial
12 investigation?

13 A. As I stated before, we prepared or our
14 contractor prepared a work plan to conduct the
15 remedial investigation and the feasibility study
16 at both Midco I and Midco II. I believe it was
17 submitted or finalized in February of 1985. And
18 we initiated work on the remedial investigation
19 feasibility study.

20 Then we discontinued it when the
21 responsible group of responsible parties agreed
22 to implement the remedial investigation
23 feasibility study, in accordance with our
24 approved work plan.

1 So, our contractor discontinued work on
2 it. And the contractor working for the
3 responsible parties initiated work on the RI/FS
4 in a round May 1985, with oversight by USRPA.

5 Q. What work did your contractor -- who
6 was your contractor?

7 A. CH-2-M-Hill.

8 Q. And what work was done by CH-2-M-Hill?

9 A. On the remedial investigation
10 feasibility study?

11 Q. Yes.

12 A. Okay.

13 They prepared the remedial action
14 master plan.

15 Q. Is that the one we discussed before?

16 A. Yes.

17 Q. Okay.

18 A. They prepared the work plan. They
19 conducted or contracted physical work to be
20 conducted at Midco I.

21 Q. Okay.

22 A. And they initiated some procurement
23 activities regarding monitoring well
24 installation, which they had to discontinue.

1 And they closed out their contract. And also
2 there were project management costs included in
3 those activities.

4 Q. And between the December 1983
5 endangerment assessment and the time that the
6 defendants undertook the remedial investigation,
7 was there any further endangerment analysis done
8 by EPA or its contractors?

9 A. Between the 1983 and the --

10 Q. Yes.

11 A. -- the risk assessments conducted by
12 the --

13 Q. Yes.

14 A. For the remedial investigation
15 feasibility study?

16 Q. Yes.

17 A. At Midco I?

18 Q. Yes.

19 A. Not that I am aware of.

20 Q. This agreement by the defendants to do
21 the RI and FS, was that incorporated into a
22 formal document, a formal agreement?

23 A. Yes. It is in the partial consent
24 decree.

1 Q. Is that in the record?

2 A. Yes.

3 Q. Would you find it, please.

4 A. Okay.

5 Q. The agreement to do the RI/PS was in
6 June of 1985; is that right?

7 A. I believe there was some type of an
8 understanding before that and it was -- it might
9 have been finalized around June 1985, I am not
10 sure exactly.

11 Q. When did the informal agreement go into
12 effect?

13 A. I know -

14 MR. TENENBAUM: Objection to the extent it
15 calls for a legal conclusion.

16 A. I know Geosciences called me in April.
17 So there must have been some type of agreement
18 by then.

19 BY MR. KARAGANIS:

20 Q. At the time were you involved in the
21 negotiation of the technical elements of the
22 1985 partial consent decree?

23 A. There wasn't very much negotiation.
24 The participants agreed to implement the

1 remedial actions in accordance with the
2 approved -- USEPA's approved work plan.

3 Q. At the time the government entered into
4 the partial consent decree with respect to Midco
5 I, did the government demand that the defendants
6 take any action to abate any emergency or
7 immediate health threats at or around the Midco
8 I site?

9 MR. TENENBAUM: Same objection.

10 A. You mean in the 1985 partial consent
11 decree?

12 BY MR. KARAGANIS:

13 Q. Yes. Either in the document itself or
14 verbal demands, written demands outside of the
15 document.

16 Did the government say look, we have
17 got these immediate health threats here, we want
18 you to address them?

19 A. Okay.

20 Well, I know they were negotiating for
21 actions at Midco II. And eventually we had to
22 do those ourselves. That included removal of
23 drums and containerized wastes on the surface,
24 and excavation of the sludge pit and filter bed.

1 Q. Rich, I will get into Midco II. I am
2 asking about Midco I.

3 In 1985 as to the Midco I site, did the
4 government demand that the defendants -- 1985.
5 Did the government demand that the defendants
6 take any emergency or immediate action to abate
7 any emergency or immediate health threat at or
8 around the Midco I site?

9 MR. TENENBAUM: Same objection.

10 A. No. There was no -- that type of
11 action was not required in the partial consent
12 decree.

13 BY MR. KARAGANIS:

14 Q. Or anywhere else by the government?

15 A. That's correct.

16 Q. Now, when is the next time in which --
17 I am stopping with the chronology here at C-I on
18 your interrogatories that you filed in 1985,
19 which I might note for the record that you have
20 a continuing duty to supplement under the
21 Federal Rules of Civil Procedure.

22 That is for your counsel, not for you.

23 MR. TENENBAUM: As do the defendants.

24 Whatever the rules require, anyway.

1 BY MR. KARAGANIS:

2 Q. When next was the subject of
3 endangerment raised or addressed in any way at
4 Midco I?

5 MR. TENENBAUM: Same objection.

6 A. That would have been during the
7 completion of the remedial investigation.

8 BY MR. KARAGANIS:

9 Q. All right.

10 Now, how does a remedial investigation
11 address endangerment?

12 MR. TENENBAUM: I am afraid that we are now
13 into a record issue again.

14 MR. KARAGANIS: I am not asking about this
15 case or anything else.

16 I am asking about how under the CERCLA
17 program. This has nothing to do with any record
18 issue or this record or anything else.

19 How does this question of endangerment
20 come up doing an RI under the National
21 Contingency Plan?

22 MR. TENENBAUM: How is that relevant to a
23 non-record issue?

24 MR. KARAGANIS: It is relevant to what

1 costs, whether the costs were consistent with
2 the NCP.

3 You are seeking costs here for the work
4 that was done. I am trying to find out how
5 endangerment costs come into the NCP at this
6 stage of the process, the RI process.

7 MR. TENENBAUM: I don't know that you have
8 established that there are costs.

9 MR. KARAGANIS: I guarantee if you go
10 through it, you are seeking --

11 I am sure that work was done on
12 endangerment, was there not?

13 MR. TENENBAUM: If that is his question, why
14 don't you tell him what work was done on
15 endangerment.

16 MR. KARAGANIS: That isn't my question.

17 The first question is a foundation
18 question. How does endangerment come into the
19 RI process under the National Contingency Plan?

20 MR. TENENBAUM: The foundation question is
21 to see if there are any costs first.

22 MR. KARAGANIS: Are you instructing the
23 witness not to answer the question I have just
24 phrased?

1 MR. TENENBAUM: I am going to instruct the
2 witness to limit his answer to costs recovery
3 issues.

4 We have pending before the court a
5 motion for protective order on discovery on the
6 record issue of the finding of limited and
7 substantial endangerment.

8 MR. KARAGANIS: Mr. Tenenbaum, I am entitled
9 to find out as a defense on the issue of costs
10 whether the costs are consistent, among other
11 things, with the NCP.

12 The first question I have got to ask is
13 whether costs dealing with endangerment fit into
14 the NCP at the RI stage. That's what I am
15 asking him.

16 In other words, does EPA --

17 MR. TENENBAUM: That question wouldn't arise
18 if there weren't any costs, would it?

19 MR. KARAGANIS: Sure, it would.

20 MR. TENENBAUM: How, if there were no cost?

21 MR. KARAGANIS: Because if EPA didn't do its
22 duty and didn't conduct an endangerment
23 assessment, which I assume they did, but had
24 they not conducted an endangerment assessment,

1 they would have violated their duty and their
2 conclusions would have been in violation of the
3 NCP. You have got to follow the rules, Mr.
4 Tenenbaum.

5 MR. TENENBAUM: I am sure the Agency does
6 follow the rules.

7 I am just going to object and you can
8 try and answer. But, please try and limit your
9 answer to costs.

10 BY MR. KARAGANIS:

11 Q. Go ahead.

12 A. Okay.

13 Well, the first step in a remedial
14 investigation, and all this is available in
15 guidance documents that are available from
16 USEPA, and also in the National Contingency Plan
17 to some degree, is to evaluate the site,
18 determine the extent of contamination.

19 The next step would be taking the data
20 from the site, evaluating the hazards to human
21 health and the environment due to those -- based
22 on that data.

23 Q. All right.

24 And is there an endangerment assessment

1 that relates to any immediate health threats,
2 short-term health threats done as part of the
3 NCP process?

4 MR. TENENBAUM: Objection.

5 The RI here as far as I know was done
6 by you all, wasn't it?

7 MR. KARAGANIS: No, it is done under EPA
8 supervision, Mr. Tenenbaum.

9 MR. TENENBAUM: Do you want to ask about his
10 supervision?

11 MR. KARAGANIS: No.

12 I am asking whether or not he, the
13 Agency, requires that an endangerment
14 assessment, whether or not there are any
15 immediate health threats, be done as part of the
16 RI, whether they do it or whether they have the
17 PRP's do it.

18 MR. TENENBAUM: Same objection.

19 BY MR. KARAGANIS:

20 Q. Go ahead.

21 MR. TENENBAUM: Also vague and ambiguous.

22 A. The endangerment assessment should
23 address all types of risks, both acute risks,
24 short-term risks, long-term risks, potential

1 risks, current risks.

2 BY MR. KARAGANIS:

3 Q. Then as part of the RI process, or as
4 part of the process under the NCP, is there a
5 separate health assessment done by the ATSDR?

6 MR. TENENBAUM: Same objection.

7 A. Yes. They also conduct a health
8 assessment.

9 BY MR. KARAGANIS:

10 Q. Now, do health professionals -- by
11 health professionals I mean people trained
12 specifically in toxicology or public health --
13 are they the ones who do the work for the ATSDR?

14 MR. TENENBAUM: If you know.

15 A. As far as I know, yes. They are
16 medical doctors, even to the extent of being
17 medical doctors, yes.

18 BY MR. KARAGANIS:

19 Q. Now, when EPA supervises a private
20 group of defendants or private group of
21 responsible parties who are doing an
22 endangerment assessment, does EPA use medical or
23 public health personnel to supervise the conduct
24 of the health endangerment assessment?

1 A. Medical or public health?

2 Q. Professionals, yes.

3 A. I think in general we use people who
4 are experienced in evaluating risks to the
5 public health or the environment.

6 Q. Who at EPA supervised from a public
7 health standpoint, someone experienced in public
8 health risks and endangerment -- who at EPA
9 supervised the conduct of the endangerment
10 assessment for the Midco I site done by the
11 defendants?

12 A. Well, I did to some degree. And also
13 personnel from Weston and PRC.

14 Q. Would you show me the endangerment
15 assessment that was done for the Midco I site
16 that you supervised along with Weston and PRC?

17 MR. KEATING: Are we in the '85 one?

18 MR. KARAGANIS: We are in the one that was
19 done by agreement subsequent to '85. Yes.

20 A. Okay.

21 That was conducted pursuant to the '85
22 degree?

23 Q. Yes.

24 A. On Midco I, right?

1 Q. Yes.

2 A. The endangerment itself is in section
3 6. It is backed up by information in the rest
4 of the report.

5 Q. The endangerment assessment is section
6 6 of what document?

7 A. There is also information in Appendix
8 F.

9 Q. But the endangerment assessment is in
10 the remedial investigation report; is that
11 right?

12 A. Yes.

13 Q. Okay.

14 And the endangerment assessment is a
15 document that I take it you and Weston and PRC
16 approved?

17 MR. TENENBAUM: Compound.

18 BY MR. KARAGANIS:

19 Q. Go ahead.

20 A. USEPA approved it.

21 Q. Now, if something is found that
22 represents a short-term or immediate health
23 hazard or health risk in the endangerment
24 assessment, is there a mechanism under CERCLA

1 for taking immediate or short-term action?

2 MR. TENENBAUM: Objection, calls for a legal
3 conclusion, seeks discovery on record issues.

4 Please limit your answer to cost
5 issues.

6 BY MR. KARAGANIS:

7 Q. Go ahead, Rich.

8 A. Yes. There is a mechanism in CERCLA to
9 address that.

10 Q. What is that?

11 A. There is an emergency response branch
12 to conduct removal actions, which could include
13 fencing the site.

14 Q. And that could include fencing the
15 site.

16 It could include adding to the cover
17 that's already on the site; it could include
18 providing alternative water supply, could it
19 not?

20 A. That's correct.

21 MR. TENENBAUM: Same objections.

22 BY MR. KARAGANIS:

23 Q. And that is the person, that emergency
24 response branch has the person who is the OSC or

1 on scene coordinator; is that right?

2 A. That's correct.

3 Q. Who is the current on scene
4 coordinator?

5 A. Well, there is no action being taken so
6 there is no on scene coordinator.

7 Q. Is there any OSC assigned to this site?

8 A. To Midco I?

9 Q. Yes.

10 A. At this time. No.

11 Q. Okay.

12 Did the endangerment assessment that is
13 contained in the RI for Midco I identify any
14 immediate or emergency public health threats
15 that needed response?

16 MR. TENENBAUM: How is this relevant to a
17 non-record issue?

18 MR. KARAGANIS: It is relevant to whether
19 the costs you are seeking now are different than
20 the costs we have already paid.

21 MR. TENENBAUM: I don't recall that at
22 all -- I don't follow that at all.

23 What does this -- the cost you have
24 already paid. I don't follow that at all. The

1 cost you have already paid, what does that have
2 to do this with?

3 MR. KARAGANIS: At the settlement we paid \$5
4 million.

5 MR. TENENBAUM: What does it have to do with
6 the RI/FS?

7 I have already told you, your problem,
8 you seem to confuse spending money to address
9 one hazard, which doesn't mean that you have
10 addressed every hazard.

11 MR. KARAGANIS: But I am thinking that you
12 are duplicating --

13 MR. TENENBAUM: It doesn't mean that new
14 problems do not occur.

15 MR. KARAGANIS: If there are new problems,
16 that is fine. I am trying to find out whether
17 there is anything different other than what we
18 already paid for.

19 MR. TENENBAUM: You didn't ask that.

20 MR. KARAGANIS: Yes, we did. We paid to
21 address immediate health threats at Midco I.

22 I am trying to find out whether any new
23 immediate health threats have developed.

24 MR. TENENBAUM: If you want to ask the

1 witness whether or not you are being asked to
2 pay for something you have already paid for, he
3 can answer that. But, you are not asking that.

4 MR. KARAGANIS: Alan, let me ask my
5 questions with respect to cost here. It is my
6 deposition, it isn't yours.

7 I don't have to ask questions in the
8 way you want me to ask them.

9 MR. TENENBAUM: I think we have to balance
10 the need to protect the record issues with the
11 need for discovery on non-record issues.

12 MR. KARAGANIS: Hold it.

13 I am not making any severe statements
14 here as to what has been done. But, I am trying
15 to find out when and if a public health
16 emergency ever developed here. After we paid \$5
17 million to address public health emergencies.
18 And I am having some troubles, Alan.

19 MR. TENENBAUM: We have a disagreement as
20 you know on the standard.

21 MR. KARAGANIS: If you want to stipulate
22 there is no public health emergency at this
23 time, fine.

24 MR. TENENBAUM: No, I am not here to

1 stipulate to that.

2 MR. KARAGANIS: You have a client. I have a
3 client that you are seeking \$25,000 a day in
4 penalties from for failing to address an abate
5 what was held to be an imminent and substantial
6 endangerment.

7 If there is something new, let's find
8 out about it.

9 Right now I am trying to find out
10 whether at any time these people were asked to
11 address immediate health threats. I found that
12 they didn't, they weren't --

13 MR. TENENBAUM: This is just an
14 investigation.

15 MR. KARAGANIS: If he saw something in here,
16 I am assuming he did his duty and immediately
17 demanded action. If he didn't see anything in
18 there --

19 MR. TENENBAUM: If he immediately demanded
20 action, then you would have --

21 MR. KARAGANIS: We would have done it, if
22 there was a public health threat there, Alan.

23 MR. TENENBAUM: You want to take discovery
24 to see if he asked them to do something. Then

1 if they did it, that would mean that they have
2 already done it, so they can't -- they don't
3 have to pay for it again?

4 MR. KARAGANIS: It relates to past payments
5 and it relates to sufficient cause.

6 It relates to whether or not -- if
7 you're coming in and saying oh, we have
8 discovered something now based on all the
9 evidence that we have had here, we didn't ask
10 for it earlier, there may be sufficient cause to
11 refuse to do it.

12 And it also --

13 MR. TENENBAUM: The fact that there was a
14 basis under the statute arguably you are saying
15 to do something in 1987, and --

16 MR. KARAGANIS: Wait a minute.

17 MR. TENENBAUM: And if the Agency didn't do
18 it until 1989, and there's still an imminent and
19 substantial endangerment in '89, that,
20 therefore, they can't require you to do it any
21 more?

22 MR. KARAGANIS: My suggestion is it was
23 already paid for, the imminent substantial
24 endangerment here.

1 MR. TENENBAUM: What is the payment?

2 MR. KARAGANIS: Five million bucks.

3 MR. TENENBAUM: That is not what you are
4 asking about. The 5 million bucks was paid
5 before the RI was done.

6 MR. KARAGANIS: If there was anything --

7 MR. TENENBAUM: I don't even know if 5
8 million is the right number, by the way.

9 MR. KARAGANIS: I believe it is several
10 million dollars.

11 MR. KEATING: 5.

12 MR. KARAGANIS: If the RI discovered
13 anything new, Alan, those costs wouldn't have
14 been covered. But, if the RI didn't discover
15 anything new, those costs are already covered by
16 the previous payment.

17 MR. TENENBAUM: I just told you that the
18 fact -- if you want to ask him whether --

19 MR. KARAGANIS: We are chewing up a lot of
20 transcript with a lot of unnecessary argument.

21 MR. TENENBAUM: The question is flawed.

22 MR. KARAGANIS: It is not flawed.

23 O. Mr. Boice, yesterday we talked about
24 the ATSDR report of June 1987, do you recall

1 that?

2 A. Yes.

3 Q. And when was the RI endangerment
4 assessment for Midco I completed, December '87,
5 is that right?

6 A. That's right. That is the final
7 version.

8 Q. You went through very patiently with me
9 on the ATSDR request as to items that ought to
10 be addressed to protect the public health.

11 A. Yes.

12 Q. Were there any different items found in
13 the endangerment assessment that were needed to
14 protect the public health from any immediate or
15 emergency health threat?

16 MR. TENENBAUM: Same objection. Vague and
17 ambiguous.

18 A. Yes.

19 BY MR. KARAGANIS:

20 Q. All right.

21 What was different from the standpoint
22 of immediate or emergency health threats that
23 was found in the December '87 endangerment
24 assessment that had not been found either in the

1 June '87 ATSDP report or the December -- I am
2 sorry -- November 84 CH-2-M-H remedial action
3 master plan?

4 MR. TENENBAUM: Same objection.

5 A. You were only referring to immediate or
6 emergency?

7 BY MR. KARAGANIS:

8 Q. Immediate or emergency health threats,
9 that's correct.

10 A. I thought you were talking about any
11 imminent and substantial endangerment.

12 As far as immediate threat, as far as
13 compared to the ATSDR report, I would say no.

14 Q. Was there any demand at the conclusion
15 of the endangerment assessment, demand request
16 or communication of any kind that the defendants
17 fence the boundaries, the entire boundaries of
18 the Midco I site?

19 A. No, there wasn't.

20 Q. Was there any demand at the conclusion
21 of the endangerment assessment that the
22 defendants add to the cover that was already
23 existing on the Midco I site?

24 A. No, there wasn't.

1 Q. I take it the purpose of the cover, the
2 original cover that was put on there, was in
3 part to restrict access, was it not?

4 A. I would only be presuming, I'm not sure
5 why it was put on. I presume it would be to
6 restrict access.

7 MR. TENENBAUM: That is calling for him to
8 speculate.

9 MR. KARAGANIS: Yes, he knows. He works in
10 this area. Yes.

11 MR. TENENBAUM: Wait a second.

12 MR. KARAGANIS: Mr. Tenenbaum -

13 MR. TENENBAUM: He said he didn't know.

14 MR. KEATING: An educated guess.

15 MR. KARAGANIS: Mr. Tenenbaum, again I don't
16 want to sound, but any person who has worked
17 with waste sites for more than six months knows
18 that one of the purposes of the cover is to
19 restrict access.

20 Now, if you want to denigrate his skill
21 and experience by saying he doesn't know, that
22 is up to you. But, I am assuming that he has a
23 considerable amount of experience.

24 Q. Rich, isn't one of the purposes of the

1 cover to restrict access?

2 A. As I said before, to separate people
3 who would be on the site from the waste and also
4 to hopefully reduce infiltration through the
5 wastes and additional contamination of the
6 groundwater.

7 Q. So as of December of '87 at the RI,
8 there was no demand or request by EPA at that
9 time that additional restriction of access be
10 done?

11 A. No, there wasn't.

12 Q. An alternative water supply, there was
13 no demand in December of 1987 to provide an
14 alternative water supply?

15 MR. TENENBAUM: Same objection.

16 A. No, there wasn't.

17 BY MR. KARAGANIS:

18 Q. Okay.

19 By demand, I meant request or
20 communication of any kind.

21 A. No.

22 Q. So my statement is correct, there was
23 no such communication?

24 A. That's correct.

1 Q. Were there any, if you recall from the
2 RAMP, the remedial action plaster plan, there
3 was talk as to one of the elements being a
4 posting of signs. Once you fenced the eastern
5 side, you would post signs. Were there signs
6 posted?

7 A. I don't remember. I don't remember
8 seeing any signs.

9 Q. Was there ever a demand by the
10 Agency -- I know there was no demand or request
11 or communication for a fence on the eastern
12 side. Was there a demand or request that signs
13 be posted?

14 MR. TENENBAUM: Same objection.

15 A. No, there wasn't.

16 BY MR. KARAGANIS:

17 Q. Now, is there a section of the
18 endangerment assessment that deals with acute
19 hazards?

20 A. No, I don't think they addressed acute
21 hazards.

22 Q. Did you ask them to address acute
23 hazards?

24 MR. TENENBAUM: Asked and answered.

1 BY MR. KARAGANIS:

2 O. Go ahead.

3 MR. TENENBAUM: The question is whether
4 there is a specific section?

5 MR. KARAGANIS: I am asking whether -- you
6 said he was supervising the endangerment
7 assessment.

8 MR. TENENBAUM: He already answered with
9 respect to that earlier. Now you are asking
10 whether there is a particular section.

11 MR. KARAGANIS: No.

12 I am asking him with respect to the
13 supervision of the endangerment assessment,
14 whether or not Mr. Boice or the EPA asked the
15 defendants to address acute endangerment.

16 MR. TENENBAUM: I have it right down in my
17 notes. He already answered that.

18 MR. KARAGANIS: No, he didn't.

19 MR. TENENBAUM: I have it right here.

20 MR. KARAGANIS: He said earlier that under
21 the rules you are supposed to address acute
22 risk.

23 MR. TENENBAUM: Oh, this is a different
24 question from that.

1 MR. KARAGANIS: This is a different
2 question.

3 I then asked him is acute risk
4 addressed in the endangerment assessment, and he
5 just told me it isn't.

6 Isn't that right?

7 MR. TENENBAUM: No, he didn't. He said
8 there wasn't a specific section.

9 Maybe we have to have the witness
10 review it, if you are going to ask him detailed
11 questions like that.

12 BY MR. KARAGANIS:

13 Q. Is there a section or portion or
14 paragraph, whatever, that addresses acute risk
15 in the endangerment assessment?

16 A. To the best of my recollection, it
17 doesn't address acute risks.

18 Q. Okay.

19 Now, my follow-up question was did
20 either you or the anybody else at the EPA
21 request, demand or communicate with the
22 defendants asking that an acute risk assessment
23 be done?

24 MR. TENENBAUM: To his knowledge.

1 MR. KARAGANIS: To his knowledge.

2 MR. TENENBAUM: In 1987?

3 MR. KARAGANIS: At any time.

4 MR. TENENBAUM: At any time.

5 A. Yes.

6 I remember I -- one of my comments was
7 to conduct a scenario where a person would go on
8 the site and have a one-time exposure type of
9 scenario.

10 BY MR. KARAGANIS:

11 Q. Did you memorialize that in any
12 memorandum or any communication?

13 A. I believe it is in one of our comments,
14 yes.

15 Q. One of your comments on what?

16 A. Comments on the remedial investigation.

17 Q. All right.

18 Where is that in the record?

19 A. I would have to look through the
20 documents and find it.

21 Q. Please do.

22 MR. TENENBAUM: Is that going to take a
23 while?

24 A. It might take a while.

1 MR. TENENBAUM: Can we take a break if it is
2 going to take a while?

3 MR. KARAGANIS: Before you do. We will find
4 it.

5 Q. But, did you approve the remedial
6 investigation without the acute endangerment
7 assessment?

8 A. Yes.

9 We felt that we had enough information
10 on the risks to justify remedial actions at the
11 site. It included an evaluation of chronic
12 risks, that is, lifetime or very long risks, and
13 subchronic risks, which are short-term, shorter
14 term exposures but somewhat longer than a
15 one-time, what I wouldn't consider an acute
16 exposure.

17 Q. And before you get into the document,
18 did you say that before this project can go
19 forward, we need an acute risk assessment?

20 A. That was one of the comments. I would
21 have to see the comment letter to see exactly
22 how it was phrased.

23 Q. Did you demand that action be taken to
24 address acute risks?

1 MR. TENENBAUM: Objection.

2 A. I think I already answered that
3 question.

4 BY MR. KARAGANIS:

5 Q. No. I am talking about specific
6 action.

7 Was there was there an acute risk in
8 your mind that needed addressing, physical
9 action?

10 MR. TENENBAUM: You shifted.

11 You are asking him about whether he
12 asked them to investigate it. Now you are
13 asking him whether or not -- then you asked him,
14 and I think you presumed that they didn't
15 investigate it.

16 Now you are asking him whether even
17 though they didn't investigate it --

18 MR. KARAGANIS: I will bring it together.

19 Q. Did they investigate the acute risk?

20 MR. TENENBAUM: If you know.

21 A. Investigate is the wrong word.

22 We did take plenty of samples. But, in
23 the remedial investigation itself, I don't think
24 the acute risk scenario was evaluated.

1 BY MR. KARAGANIS:

2 Q. This is in 1987, did you investigate --

3 MR. KEATING: I think you ought to get that
4 on the record. I have been trying to follow.
5 He didn't answer in 1987. It should be clear in
6 it was in 1987.

7 BY MR. KARAGANIS:

8 Q. In 1987, you have indicated that the RI
9 did not address acute risks.

10 Did EPA take separate action to
11 evaluate acute risks in 1987?

12 A. No, we didn't.

13 Q. Did you take separate action to
14 evaluate acute risk in 1988?

15 A. No, we didn't.

16 Q. When was the first time you took action
17 to analyze acute risk?

18 A. That would have been in 1989, when we
19 prepared the unilateral administrative order.

20 Q. When specifically did you first address
21 acute risk?

22 A. Address is the wrong word. We really,
23 of course --

24 MR. TENENBAUM: Same continuing objection.

1 A. In the removal action we addressed
2 immediate hazards.

3 BY MR. KARAGANIS:

4 Q. Yes. You took care of them, didn't
5 you?

6 MR. TENENBAUM: Objection.

7 BY MR. KARAGANIS:

8 Q. The removal action took care of the
9 immediate hazards, did they not?

10 A. Yes.

11 Q. All right.

12 A. Then as far as acute risks, acute
13 meaning an exposure scenario in which there is a
14 one-time exposure, so the risk -- it is a risk
15 that would happen if that one-time exposure
16 scenario occurred.

17 Q. All right.

18 A. And that happened in 1989.

19 Q. When in 1989?

20 A. It would be in probably during October
21 1989.

22 Q. When specifically during October of
23 1989 did you first undertake to do an assessment
24 of acute risk?

1 A. I don't know exactly. I guess it would
2 have been -- when we decided to do that?

3 Q. Yes.

4 MR. TENENBAUM: Hold it a second, wait a
5 second.

6 A. It would have been September, October.

7 MR. TENENBAUM: Probably this is getting
8 into the Agency's processes here. I have to
9 stop this line of questioning.

10 MR. KARAGANIS: No, you don't have to stop
11 anything, Mr. Tenenbaum.

12 MR. TENENBAUM: You are asking --

13 MR. KARAGANIS: I am asking specifically
14 where in this record or any other document did
15 you first address acute risk.

16 MR. TENENBAUM: No.

17 A. We didn't say address acute risk.
18 That's the wrong word.

19 BY MR. KARAGANIS:

20 Q. Where is a piece of paper, Mr. Boice?

21 A. You mean evaluate acute risk?

22 Q. Yes.

23 A. An acute risk scenario. Okay.

24 Q. When, where in the record?

1 MR. TENENBAUM: I will object to this whole
2 line of questioning as vague and ambiguous.

3 BY MR. KARAGANIS:

4 Q. Go ahead, Mr. Boice.

5 Where in the record, Boice Deposition
6 Exhibit No. 3, the indices, is there any
7 indication of when acute risk was first
8 addressed?

9 MR. TENENBAUM: Same objection.

10 A. As you know, there is an attachment to
11 the unilateral administrative orders which
12 evaluates an acute risk scenario, that was
13 prepared by PRC.

14 BY MR. KARAGANIS:

15 Q. Yes.

16 MR. TENENBAUM: What was the question?

17 BY MR. KARAGANIS:

18 Q. My question is when was that
19 undertaken, when was the acute risk scenario
20 assessment, whatever fancy words we want to use,
21 when was it undertaken?

22 A. The evaluation?

23 Q. Yes.

24 A. I already answered that question.

1 Q. You said October of 1989. Is that
2 correct?

3 A. That's correct.

4 Q. Okay.

5 The document that you referred me to,
6 appendix 3 to the unilateral administrative
7 order, says November of 1989.

8 A. Yes.

9 Q. Is there any other paper in the record
10 that reflects an assessment of acute risk other
11 than this November 2, 1989 document?

12 MR. TENENBAUM: Objection.

13 Calls for a legal conclusion, seeks
14 expert opinion, seeks discovery on record
15 issues. Vague an ambiguous.

16 BY MR. KARAGANIS:

17 Q. Go ahead.

18 A. Is your question was there a separate
19 risk assessment done in October?

20 Q. I am simply asking, other than a
21 November 2, 1989 letter, which is a letter to
22 you, is there other documentation that reflects
23 a work plan, a contract, a discussion, an
24 outline of what issue should be addressed, other

1 things that relate to an acute risk evaluation?

2 A. You mean --

3 MR. TENENBAUM: Same objection.

4 A. Including draft documents?

5 BY MR. KARAGANIS:

6 Q. Yes.

7 A. Documents, calculations.

8 Q. Documents, calculations, memoranda, et

9 cetera.

10 A. That's the only final document
11 prepared.

12 Q. I didn't ask you that question.

13 I asked you whether or not there were
14 drafts, memoranda, calculations, et cetera?

15 A. Of course there were.

16 Q. Are they included in the documents that
17 are indexed in Boice Deposition Exhibit No. 3?

18 A. No.

19 Q. Do you have them in your files?

20 A. I might have some.

21 MR. TENENBAUM: I object. The question is
22 compound.

23 MR. KARAGANIS: Do you have them in your
24 files is a compound question?

1 MR. TENENBAUM: This whole line of
2 questioning about drafts, and you are mixing up
3 drafts and calculations, compound.

4 BY MR. KARAGANIS:

5 Q. Mr. Boice, are there written materials
6 relating to the November 2, 1989 letter that is
7 appendix 3 to the unilateral administrative
8 order for the Midco I site, which written
9 materials are not indexed or included in the
10 indices to the administrative records contained
11 in Boice Deposition Exhibit 3?

12 MR. TENENBAUM: Objection.

13 Seeks to take discover into compilation
14 of the record. How is this relevant to a
15 non-record issue?

16 MR. KARAGANIS: This is relevant, Mr.
17 Tenenbaum -- I don't know why you are taking
18 this approach. You have allowed questions as to
19 what is in and what is not in the administrative
20 record.

21 I am trying to find out if there are
22 materials that have been deliberately withheld
23 from this administrative record. We are
24 entitled to find out about such materials.

1 MR. TENENBAUM: I have objected to every
2 question asking about the contents and
3 compilation of the administrative record other
4 than the certification of.

5 MR. KARAGANIS: Mr. Tenenbaum, if your
6 client has withheld documents from the
7 administrative record, for which you have not
8 claimed privilege, that relate to factual
9 matters that are in the administrative record,
10 they should have been included in the
11 administrative record.

12 You repeatedly say just tell me about
13 the documents you think are missing. I am
14 trying to find out what documents are missing.
15 You are not allowing me to find out about what
16 documents are missing.

17 MR. TENENBAUM: You have asked about drafts.
18 Is it your position that every draft belongs in
19 the record?

20 MR. KARAGANIS: I said written materials is
21 my question, Mr. Tenenbaum.

22 MR. TENENBAUM: You previously asked about
23 drafts.

24 MR. KARAGANIS: Yes and I got answers to

1 those questions. I am asking now about written
2 materials.

3 MR. TENENBAUM: That might include drafts.

4 MR. KARAGANIS: It might. It also might
5 include other things.

6 MR. TENENBAUM: I am going to object to the
7 line of questioning.

8 In the interest of expediting this, I
9 will allow him to answer if you will break down
10 your question, separate out drafts on other
11 materials.

12 If you are not going to separate it
13 out, I am going to strenuously object to that.

14 MR. KARAGANIS: Your objection is noted.

15 MR. TENENBAUM: Please answer the question
16 separately for drafts and other materials. It
17 is not a fair question otherwise.

18 MR. KARAGANIS: You can't instruct the
19 witness how to answer a question. Mr.
20 Tenenbaum, that is a violation of the canons of
21 ethics as well as the --

22 MR. TENENBAUM: I don't see why you are
23 trying to create an unclear record.

24 MR. KARAGANIS: Here, are you instructing

1 this witness not to answer that question?

2 MR. TENENBAUM: No.

3 MR. KARAGANIS: Then he has got to answer
4 it.

5 MR. TENENBAUM: Why don't you ask the
6 question in a way --

7 MR. KARAGANIS: Because I am asking the
8 questions here, Mr. Tenenbaum, not you.

9 MR. TENENBAUM: Objection.

10 MR. KARAGANIS: Your objection is noted.

11 O. Please answer the question, please.

12 A. First I would like to emphasize that I
13 think that final document, the November 2 letter
14 stands by itself.

15 Any calculations are either included in
16 there or there is references to how the
17 calculations were conducted.

18 Any factors or numbers used are either
19 included in the document or there is a reference
20 regarding where those factors came from. So it
21 is a stand-alone document.

22 As far as any documents that were
23 prepared for any of those documents, drafts are
24 not in the administrative record. There were

1 possibly -- possibly there are some calculation
2 sheets or something that would not be in the
3 administrative record.

4 Q. All right.

5 Are there any memoranda, written
6 communications, memoranda or other written
7 communications between you and PRC that are not
8 in the administrative record?

9 MR. TENENBAUM: Same objection.

10 A. I would have to check my file.

11 BY MR. KARAGANIS:

12 Q. Mr. Boice, are there any memoranda of
13 telephone conversations? Records of telephone
14 conversations between you and representatives of
15 PRC with regard to this?

16 A. That's what I was referring to.

17 Q. I asked you, my first question was as
18 to written memoranda involving written
19 communication. Any written communications of
20 any kind between you and PRC.

21 A. Other than drafts?

22 Q. Cover letters, memoranda, transmittal
23 letters, contract negotiations, instructions.
24 Any written material.

1 A. To the best of my recollection, I
2 didn't prepare any written materials on it.
3 But, I could check and see if there are any.

4 Q. I didn't ask you whether you prepared
5 any.

6 I asked you whether any were prepared
7 by the Agency or received by the Agency?

8 A. To the best of my recollection, no, but
9 I would have to check the files.

10 Q. All right.

11 Are you familiar with Greek mythology?

12 A. Is that relevant?

13 Q. Yes, it is.

14 Do you understand the myth of how
15 Athena rose full born from the head of Zeus?

16 Are you saying this document was
17 created for the first time on November 2, 1989
18 without any previous written material?

19 A. I don't know what you mean by written
20 material.

21 Q. I mean communications of any kind
22 between you and PRC.

23 A. There were obviously communications,
24 but I don't know whether there were any written

1 communications.

2 Q. When did you first contact PRC in any
3 way?

4 A. Regarding?

5 Q. With regard to an evaluation of acute
6 risk.

7 MR. TENENBAUM: Objection.

8 A. It would have been either September or
9 October probably.

10 BY MR. KARAGANIS:

11 Q. You earlier said October.

12 Let's get the dates precise. Was it
13 September or October?

14 A. That is why I said either September or
15 October.

16 Q. Which was it?

17 A. I don't know.

18 Q. Do you keep a time record?

19 A. You mean time sheets. Yes.

20 Q. All right.

21 Did you keep a time sheet as to when
22 you first contacted PRC with regard to an acute
23 health hazard evaluation?

24 MR. TENENBAUM: Objection.

1 A. I might have that record some place,
2 but I don't know. It wouldn't be on a
3 timesheet. No.

4 BY MR. KARAGANIS:

5 Q. All right.

6 Where do you keep that record, if it is
7 not kept on a time sheet?

8 Do you keep a diary?

9 A. Yes.

10 Q. Would that diary reflect actions you
11 took with respect to Midco?

12 A. It tells generally what I was doing
13 during the day.

14 Q. All right.

15 Would that include items as to what you
16 did with respect to Midco?

17 A. Yes.

18 Q. Was that diary included in the index to
19 administrative records with respect to --

20 MR. TENENBAUM: Objection.

21 BY MR. KARAGANIS:

22 Q. -- with respect to Boice Deposition
23 Exhibit 37

24 MR. TENENBAUM: Objection.

1 A. Of course not.

2 BY MR. KARAGANIS:

3 Q. Would you bring the documents with you
4 at the lunch break --

5 A. What documents?

6 Q. The documents that reflect when you
7 first contacted PRC with respect to an acute
8 endangerment assessment.

9 MR. TENENBAUM: I don't see how that is
10 relevant to a non-record issue.

11 MR. KARAGANIS: It is highly relevant.

12 A. What difference does it make whether --

13 MR. TENENBAUM: There is no question.

14 MR. KARAGANIS: If PRC was contacted in
15 October of 1989 for the first time, there is
16 either evidence of gross negligence by EPA with
17 respect to protection of the public health; or,
18 alternatively, evidence that the alleged health
19 hazard was manufactured.

20 Either people have been --

21 MR. TENENBAUM: That doesn't follow at all.
22 That is ridiculous.

23 MR. KARAGANIS: It is?

24 Then why have we been sitting for nine

1 years on so-called acute health hazards that
2 haven't been addressed? Either that, or you
3 manufactured a health hazard. There is nothing
4 new here, Mr. Tenenbaum.

5 I am just going to stay this for the
6 record once, just for the record once. You tell
7 me so that my client can address this.

8 What is the emergency or immediate
9 health hazard that needs to be addressed at the
10 Midco I site? And I will immediately go back to
11 my client, I have been trying to find this out
12 for months, and ask that immediate action be
13 taken.

14 MR. TENENBAUM: As you know, the statute
15 does not use the word emergency. And we will
16 have ample opportunity to brief the issue of
17 imminent substantial endangerment.

18 MR. KARAGANIS: Let's stop dancing around.
19 I am going to ask the judge to read this. I
20 don't want briefs or anything else.

21 I want the government to tell me what
22 public health threat exists that must be abated
23 on an immediate or imminent or emergency basis?

24 Because I will go to my client this

1 afternoon and ask that immediate and emergency
2 action be taken. And if you won't tell me that,
3 you can't accuse me of refusing to abate an
4 imminent and substantial endangerment.

5 MR. TENENBAUM: The decisional documents in
6 this case as well as the full administrative
7 record amply document the imminent and
8 substantial endangerment at these sites.

9 MR. KARAGANIS: So, Mr. Tenenbaum --

10 MR. TENENBAUM: Your client has refused --

11 MR. KARAGANIS: With all due respect --

12 MR. TENENBAUM: -- to take measures to
13 address that.

14 MR. KARAGANIS: You are refusing to identify
15 what emergency action needs to be taken?
16 Because I am ready to do it.

17 MR. TENENBAUM: I told you that, we are not
18 here --

19 MR. KARAGANIS: As an officer of the court,
20 I am ready to recommend to my client --

21 MR. TENENBAUM: Your client has refused to
22 do that --

23 MR. KARAGANIS: That is not true, Mr.
24 Tenenbaum.

1 MR. TENENBAUM: -- to take care of this.

2 MR. KARAGANIS: If you tell me what needs to
3 be done out there tomorrow, I will go to my
4 client this afternoon.

5 And I take it from your silence, from
6 your failure to tell me what needs to be done
7 out there tomorrow ---

8 Mr. Boice, I heard you whiaper in your
9 counsel's ear. You asked him to do fencing.

10 Q. Is fencing what needs to be immediately
11 done?

12 MR. TENENBAUM: Just a second.

13 MR. KARAGANIS: Let's get it on the record.
14 Because I want to show this transcript to Judge
15 Moody.

16 I want to know what needs to be
17 immediately done.

18 MR. TENENBAUM: We are not going to play
19 games at the deposition and debate the statutory
20 provisions of CERCLA here.

21 If you want to take discovery into
22 factual matters that are not record issues,
23 let's proceed.

24

1 BY MR. KARAGANIS:

2 Q. Mr. Polco, as a result of the
3 endangerment assessments that have been done,
4 including the acute endangerment assessment by
5 PRC -- I am sorry.

6 Are there any other endangerment
7 assessments other than the one that was in the
8 RI for Midco I and then the PRC endangerment
9 assessment that relate to imminent and
10 substantial endangerment?

11 MR. TENENBAUM: Any?

12 MR. KARAGANIS: Any documents that relate to
13 imminent substantial endangerment other than the
14 endangerment assessment in the RI and the PRC
15 endangerment assessment.

16 MR. TENENBAUM: That is discover into a
17 record issue.

18 MR. KARAGANIS: I just want to find out
19 about the existence of the documents.

20 MR. TENENBAUM: You are trying to take
21 discovery into a record issue.

22 MR. KARAGANIS: If there aren't any such
23 documents, I need to know.

24 If there are such documents, I don't

1 want the witness to be sand bagged later in
2 direct examination.

3 MR. TENENBAUM: We have allowed this,
4 subject to my objections, this line of
5 questioning, not for purposes of imminent and
6 substantial endangerment discovery.

7 MR. KARAGANIS: I understand that.

8 MR. TENENBAUM: You cannot use this for that
9 purpose. How will he be sand bagged on cost
10 issues?

11 MR. KARAGANIS: I am trying to find out with
12 respect to the costs that he is charging on
13 imminent substantial endangerment, whether the
14 Agency has expended dime one in the preparation
15 or supervision of any other document relating to
16 imminent substantial endangerment.

17 MR. TENENBAUM: The way you asked your
18 question, it is just so unfair. Because in the
19 context of costs, you are asking him to say
20 rather than asking him what is this cost for and
21 what is that cost for, which I guess we are
22 going to have next week.

23 You are asking him to say of all the
24 costs you are seeking, all the documents that

1 exist, which are those that relate to imminent
2 substantial endangerment. That's record
3 discovery, that's record issues.

4 MR. KARAGANIS: I just said any --

5 MR. TENENBAUM: That is discovery into a
6 record issue.

7 MR. KARAGANIS: Are you instructing the
8 witness not to answer?

9 MR. TENENBAUM: This is not as to cost.

10 MR. KARAGANIS: It is as to costs.

11 MR. TENENBAUM: You are including the word
12 costs in and saying --

13 MR. KARAGANIS: Mr. Tenenbaum, are you
14 instructing the witness not to answer?

15 MR. TENENBAUM: I am going to have to
16 instruct the witness not to answer, yes. Your
17 question is --

18 BY MR. KARAGANIS:

19 Q Mr. Boice, if your counsel allowed you
20 to answer whether or not RPA has expended any
21 costs in producing any other endangerment
22 documents or supervising the production of any
23 endangerment documents, would you be able to
24 answer that question?

1 MR. TENENBAUM: That is not quite the same
2 question that you asked.

3 A. Yes.

4 MR. TENENBAUM: I note for the record that
5 is a different question.

6 BY MR. KARAGANIS:

7 Q. Mr. Boice, in the five years you have
8 been on this case, have you ever asked any of
9 the defendants, you or anybody else you know of
10 at EPA, to add additional cover to the existing
11 cover on the Midco I site?

12 A. I already answered that question.

13 Q. Would you answer it, please?

14 A. No, we haven't.

15 Q. Okay.

16 Have you ever asked them in the five
17 years you have been on this case to provide
18 additional water supply?

19 A. You mean an alternate water supply to
20 residents?

21 Q. Yes.

22 A. No.

23 MR. TENENBAUM: Same objection.
24

1 BY MR. KARAGANIS:

2 Q. Mr. Boice, as you will recall, both the
3 remedial action master plan as well as prior
4 removal action documents and the ATSDR health
5 assessment of 1987 address immediate public
6 health risks, and also suggested that should
7 such risks develop, there be certain procedures
8 undertaken, some immediate procedures to protect
9 the public health.

10 Do you recall that?

11 MR. TENENBAUM: Objection.

12 A. I think your description is inaccurate.

13 BY MR. KARAGANIS:

14 Q. Is inaccurate?

15 A. Yes.

16 Q. How so?

17 A. Well, why don't you break it down. And
18 we can answer each question.

19 Q. I am now dealing with both the ATSDR
20 and the so-called RAMP documents.

21 A. Which we already discussed in length
22 yesterday.

23 Q. Right.

24 And when we discussed them, they both

1 said that if an immediate public health threat
2 existed, you do things like fencing, you would
3 address the cover, you put some more cover on
4 and you provide an alternative water supply,
5 isn't that right?

6 A. No, it didn't say that.

7 Q. It didn't?

8 A. No.

9 A. You better get it out and look again.

10 Q. The RAMP didn't talk about restricting
11 access?

12 A. I didn't say that.

13 I said it didn't state what you stated
14 it did previously. The previously statement.

15 Q. Did the RAMP say that you would
16 restrict access?

17 MR. TENENBAUM: If what?

18 MR. KARAGANIS: If there was an immediate
19 health threat.

20 A. I don't think it used those words, no.

21 Q. Immediate health threat?

22 A. Why don't we get out the document and
23 read it again.

24 Q. Get out the document and read it again,

1 Mr. Boice.

2 A. Just like yesterday.

3 MR. TENENBAUM: This has been asked and
4 answered already.

5 A. I have got to take a break.

6 MR. TENENBAUM: Okay.

7 (Whereupon a short recess was had.)

8 BY MR. KARAGANIS:

9 Q. With regard to the RAMP, the potential
10 initial remedial measures, if there was a
11 potential for direct contact by the general
12 public, the remedial initial remedial measures
13 were specified; isn't that right?

14 A. Those are specified, yes, measures that
15 could be taken to reduce contact, direct contact
16 by the general public.

17 Q. Okay.

18 Now, similarly, in the ATSDR report,
19 they made recommendations that would reduce or
20 affect the health threat, isn't that right, such
21 as restricting access?

22 A. They recommended, yes, that it would be
23 appropriate to restrict access to the east
24 portion -- to the portion of the site east of

1 Blaine Street, which the PRP's had apparently
2 done some type of risk evaluation themselves and
3 had decided to install a fence along the west
4 side, which enclosed the west side of the site
5 in a fence but left the east side of the site
6 open to the public.

7 Q. So both the ATSDR report and the RAMP
8 done by the EPA's contractor identified specific
9 actions that would be taken to address immediate
10 or emergency public health threats, isn't that
11 right?

12 MR. TENENBAUM: Objection.

13 A. I am not sure, they didn't use the
14 words immediate or emergency.

15 BY MR. KARAGANIS:

16 Q. They used the word imminent, didn't
17 they?

18 A. Yes, the word imminent is used.

19 Q. All right.

20 Now, but they did identify specific
21 actions, didn't they?

22 A. That could be taken, yes, or would be
23 appropriate.

24 Q. All right.

1 With respect to the November 1989 acute
2 endangerment assessment, were there specific
3 actions identified by the contractor that were
4 necessary to reduce or abate the acute
5 endangerment?

6 MR. TENENBAUM: Objection, seeks discovery
7 on a record issue. Instruct the witness not to
8 answer.

9 MR. KARAGANIS: You instruct the witness not
10 to answer?

11 MR. TENENBAUM: Is it relevant to a
12 non-record issue?

13 MR. KARAGANIS: Yes. What costs you are
14 seeking.

15 If the measures that were identified
16 were costs that we have already paid and already
17 done, if those are the measures necessary to
18 abate the emergency or immediate health threat,
19 then we are not paying for them twice.

20 MR. TENENBAUM: I will allow the witness to
21 answer whether or not any of the costs sought
22 are for costs that were already paid.

23 MR. KARAGANIS: My question is whether the
24 contractor identified actions to be taken to

1 abate or reduce any acute endangerment found.

2 If he did so and they have already been
3 undertaken, then we are getting hit double.

4 MR. TENENBAUM: I don't follow that at all.
5 Because, A, you have not --

6 There are two foundation predicates to
7 that question, neither of which you have
8 established.

9 And, that is, A, that they recommended
10 something that was undertaken and for which
11 costs are being sought; and, B, that you have
12 already done the things which they recommended
13 be undertaken for which costs are sought.

14 MR. KARAGANIS: If they didn't recommend
15 anything, it ends the line of inquiry.

16 MR. TENENBAUM: But you are asking a
17 question that is a core record issue, rather
18 than tie it into costs in the fashion that we
19 have just discussed.

20 You are asking --

21 MR. KARAGANIS: It is tied in.

22 MR. TENENBAUM: I don't see it.

23 MR. TENENBAUM: I have to instruct him not
24 to answer. I don't see how he can answer.

1 BY MR. KARAGANIS:

2 Q. Mr. Boice, if your counsel allowed you
3 to answer that question, would you be capable of
4 answering it?

5 A. What was the question?

6 Q. Whether your contractor provided any
7 recommended actions that were necessary to
8 reduce or eliminate or abate any acute health
9 threat.

10 A. Yes, I could answer that question.

11 Q. Mr. Boice, in your conduct or
12 supervision of the remedial investigation and
13 feasibility study for the Midco I site, and the
14 ultimate preparation of the document that is
15 called the ROD, or record of decision, did you
16 follow the technical requirements of 40 Code of
17 Federal Regulations Part 300?

18 MR. TENENBAUM: Objection. Calls for a
19 legal conclusion, seeks discovery into record
20 issues. But, you may answer if you know the
21 answer.

22 A. As far as I know, I did, yes.
23
24

1 (The document above-referred to
2 was marked Boice Deposition
3 Exhibit No. 54 for identification.)

4 BY MR. KARACANIS:

5 Q. Directing your attention to what has
6 been marked as Exhibit 54, it is a Federal
7 Register publication dated November 20, 1985,
8 entitled 40 CFR Part 300, National Oil and
9 Hazardous Substances Pollution Contingency Plan,
10 Final Rule.

11 Mr. Boice, is Boice Deposition Exhibit
12 No. 54 the National Contingency Plan or
13 regulation you followed?

14 MR. TENENBAUM: Objection. Calls for a
15 legal conclusion.

16 A. Well, this is published after the
17 actions were started, which were around as I
18 stated before April 1985.

19 And then this was -- I think it was
20 superseded before the remedial investigation
21 feasibility study was finished. So, I guess
22 during the period of time when it was in effect,
23 it would have been the applicable regulation.

24

1 BY MR. KARAGANIS:

2 Q. All right.

3 And the action or work that you want
4 American Can to perform under the unilateral
5 administrative order for Midco I is the work
6 that is laid out in the record of decision; is
7 that correct?

8 MR. TENENBAUM: I am sorry, that is an
9 objectionable question.

10 Do you want him to interpret the
11 administrative order?

12 BY MR. KARAGANIS:

13 Q. I am simply saying the work that you
14 are requiring American Can to perform is the
15 work that is laid out in the record of decision;
16 is that right?

17 MR. TENENBAUM: Wait a second now. This is
18 going to which issue, non-record issue?

19 MR. KARAGANIS: This is going to whether or
20 not American Can has refused -- in your words
21 they have refused to comply without sufficient
22 cause for which you are seeking penalties of
23 \$25,000 a day.

24 MR. TENENBAUM: Well, how is it going to

1 that?

2 MR. KARAGANIS: I am trying to find out if
3 that is what the remedy you want us to do is, is
4 the one that is in the ROD.

5 MR. TENENBAUM: You want to take discovery
6 into -

7 MR. KARAGANIS: I just want a simple answer,
8 this is what you are supposed to do, it is in
9 the ROD.

10 MR. TENENBAUM: The administrative order
11 speaks for itself.

12 MR. KARAGANIS: Are you instructing the
13 witness not to answer?

14 MR. TENENBAUM: I haven't made a
15 determination yet. I can't figure out what it
16 is you are trying to -- what issue you are
17 trying to find out.

18 MR. KARAGANIS: I am trying to find out what
19 you want us to do.

20 MR. TENENBAUM: Doesn't the order say what
21 we want you to do?

22 MR. KARAGANIS: I am trying to find out. If
23 you are instructing the witness not to answer,
24 you go make your draw.

1 MR. TENENBAUM: Let me think about this. It
2 is a strange question.

3 I guess you are asking for him to give
4 a legal interpretation of the administrative
5 order. That calls for a legal conclusion.

6 MR. KARAGANIS: Is that your objection?

7 MR. TENENBAUM: Wouldn't you agree that's
8 correct?

9 MR. KARAGANIS: No. I am asking him to
10 technically tell me so that I can tell my client
11 what is it that the Agency wants my client to
12 do.

13 MR. TENENBAUM: You can read it as well as
14 the witness.

15 MR. KARAGANIS: Your editorial comments are
16 noted.

17 I would like the question answered.

18 MR. TENENBAUM: It seems to clearly call for
19 a legal conclusion.

20 If you think you are well enough versed
21 in the law to answer, you can try and answer,
22 subject to my objection. I have put my
23 objection on the record.

24 A. That's really not correct, the record

1 of decision document. The selected remedial
2 action by USEPA and its reasons for selecting
3 that action. I think the unilateral
4 administrative order is the document that
5 directs the defendants regarding what they
6 should be doing.

7 And that is also made clear in the
8 second amended complaint. I guess that's
9 another. The second amended complaint would
10 also contain information on what we want the
11 defendants to do.

12 Right?

13 MR. TENENBAUM: That is why I objected.

14 It is a legal question and you are not
15 a lawyer. It is a waste of time. That is why I
16 objected. I am not saying you are right or
17 wrong, but you are not a lawyer.

18 BY MR. KARAGANIS:

19 Q. Mr. Boice, is it your contention that
20 American Can Company should perform actions as
21 directed by you where those actions violate the
22 requirements of 40 CFR Part 300?

23 MR. TENENBAUM: Same objection.

24 A. I don't think American Can should take

1 any actions directed by me personally.

2 BY MR. KARAGANIS:

3 Q. Is it your contention that American Can
4 should take actions directed by the Agency where
5 those actions violate the requirements of 40 CFR
6 Part 300?

7 MR. TENENBAUM: Same objection.

8 A. If they did, I guess I would say no.

9 BY MR. KARAGANIS:

10 Q. You guess you would say no.

11 What do you mean, that they should or
12 shouldn't perform such actions if those actions
13 violated 40 CFR Part 300?

14 MR. TENENBAUM: Same objection.

15 A. I guess I'm not an attorney. You
16 should know that better than me.

17 But, I presume if the Agency directs
18 someone to do something that is not in
19 accordance with the law, the requirements, then
20 they probably should not obey those.

21 Q. Obey the requirements or obey the
22 Agency?

23 A. Obey the Agency.

24 Q. Let's turn to the RI, the PS. With

1 respect to the Midco I site, you testified in
2 earlier examination --

3 A. I guess I should note that some things
4 like cost recovery are not included in the
5 National Contingency Plan, which are in
6 accordance with the law, of course, but wouldn't
7 be in the National Contingency Plan.

8 Q. Your answer is noted. Let me ask an
9 additional question.

10 Is it your contention, Mr. Boice, that
11 American Can should perform actions directed by
12 the Environmental Protection Agency, where said
13 actions violate the requirements of the CERCLA
14 law, the CERCLA statute?

15 MR. TENENBAUM: Objection, calls for a legal
16 conclusion.

17 A. Would you repeat the question?

18 (The question was read.)

19 A. No.

20 I think our contention is that you
21 should obey the -- comply with the unilateral
22 administrative order, which is entirely
23 consistent as far as we know with applicable
24 law.

1 BY MR. KARAGANIS:

2 Q. If the unilateral administrative order
3 and/or the record of decision remedial action
4 violated the CERCLA statute, is it your
5 contention that we should, nevertheless, perform
6 the actions that have been ordered?

7 MR. TENENBAUM: Objection, seeks legal
8 conclusions. This witness is not a lawyer.

9 BY MR. KARAGANIS:

10 Q. Go ahead.

11 MR. TENENBAUM: Just a second.

12 Will you produce an American Can
13 witness to answer those questions?

14 In fact, I had a notice, 30 (b) 5
15 deposition of American Can, I don't know if it
16 was quite on this subject, but certainly was on
17 an overlapping one. You didn't produce a
18 witness for me.

19 Are you now going to produce a witness
20 for me on this subject?

21 MR. KARAGANIS: As you so calmly told me,
22 Mr. Tenenbaum, if you want to pursue any
23 deficiencies in my discovery responses, you are
24 free to do so. I am asking this witness a

1 question, I believe.

2 MR. TENENBAUM: You can't have your cake and
3 eat it, too.

4 MR. KARAGANIS: Are you instructing the
5 witness not to answer?

6 MR. TENENBAUM: Why don't we take a break
7 and I will consider that.

8 MR. KARAGANIS: Alan, please don't discuss
9 this with the witness while there is a question
10 pending.

11 (Whereupon a short recess was had.)

12 There is a question pending.

13 MR. TENENBAUM: I have conferred with my
14 office on that, and you are seeking to ask legal
15 questions of a non-lawyer.

16 I am going to instruct the witness not
17 to answer these legal questions. We can test it
18 out at the same time that we test out American
19 Can's failure produce witnesses.

20 MR. KARAGANIS: We have not --

21 MR. TENENBAUM: You did. You are right that
22 is a slightly different issue that they failed
23 to produce a witness on, or may involve some
24 other things.

1 MR. KARAGANIS: We did not produce witnesses
2 for you, and you took a stipulation in their
3 stead with respects to questions of fact.

4 MR. TENENBAUM: Not with respect to what
5 constitutes compliance with the order and with
6 respect to whether you have complied with the
7 order, and are willing to comply with the order.

8 You have refused to produce witnesses.
9 You took the position that was completely legal
10 and you refused to even produce a witness.

11 I am going to instruct the witness not
12 to answer. We can both test out our positions
13 in court, and you can't have your cake and eat
14 it, too.

15 I take it American Can has not changed
16 its position on the production of a witness on
17 that?

18 MR. KARAGANIS: We told you that what you
19 were seeking to inquire about was privileged
20 material and it was non-factual.

21 And if you want to know whether
22 American Can -- and I will stipulate on the
23 record that it is American Can's position that
24 if what RPA has ordered violates federal

1 statutes or regulations, American Can should not
2 violate the law.

3 And I will enter into a stipulation to
4 that effect immediately. Would you care to so
5 stipulate, Mr. Tenenbaum?

6 MR. TENENBAUM: I have too many requests for
7 stipulations and other things in this case to
8 begin to --

9 MR. KARAGANIS: Are you suggesting we should
10 violate the law?

11 MR. TENENBAUM: I am not suggesting
12 anything. I am saying we are here to take the
13 deposition of the witness.

14 MR. KARAGANIS: Are you suggesting we should
15 be penalized for refusing to violate the law?

16 MR. TENENBAUM: I am suggesting that you
17 should comply with the orders which we believe
18 are fully consistent with the -- as I say, we
19 believe these orders are fully consistent with
20 the law.

21 MR. KARAGANIS: If they are illegal, Mr.
22 Tenenbaum.

23 MR. TENENBAUM: If you disagree, you can
24 test it out in court.

1 And I point out, furthermore, that you
2 have the option of complying with the orders and
3 seeking reimbursement, if you believe they are
4 not in accordance with the law under 106 (b)(2)
5 or something, whatever the statute says. I
6 really don't know the rule off the top of my
7 head.

8 BY MR. KARAGANIS:

9 Q. Mr. Doice, with respect to Midco I,
10 would it be a fair statement that an end product
11 of the remedial investigation, the establishment
12 of any remedial investigation, is the
13 establishment of cleanup action levels?

14 MR. TENENBAUM: Same objection as earlier.

15 A. Well, it would either be towards the
16 end of the remedial investigation or in the
17 feasibility study, but the final decision is
18 made in the record of decision.

19 BY MR. KARAGANIS:

20 Q. Those cleanup action levels are the
21 levels that are determined by the Agency as
22 necessary to protect public health?

23 MR. TENENBAUM: Objection. Seeks discovery
24 into the record of decision. Instruct the

1 witness not to answer.

2 MR. KARAGANIS: I am not asking as to the
3 record of decision. I am asking cleanup levels
4 under the CERCLA program.

5 MR. TEMENBAUM: That is asking for --
6 obviously, something that's part of the CERCLA
7 program is relevant, not relevant, but is may be
8 part of the decision-making process in this
9 case.

10 You are seeking discovery into the
11 decision-making process underlying the ROD. I
12 instruct the witness not to answer.

13 BY MR. KARAGANIS:

14 Q. If your counsel had not instructed you
15 to refuse to answer, would you be able to answer
16 the question?

17 A. Will you repeat the question.

18 (The record was read.)

19 A. Yes.

20 Q. All right.

21 A. Yes, I could answer that question.

22 Q. Mr. Boice, I believe in your testimony
23 under interrogation by Mr. Finch, you testified
24 that the statements made by the consulting firm

1 of ERM in their comments on the record of
2 decision document contradicted, or I am sorry,
3 their comments on the public -- was it the
4 public action document, is that what it is
5 called?

6 A. There was a May 19, I believe, 1989
7 document called something like comments on
8 feasibility study and the proposed plan.

9 Q. Is the proposed plan kept in a public
10 document, is it not?

11 A. Yes.

12 Q. And would you find that in the record,
13 the proposed plan, please?

14 A. It is for Midco I, right?

15 Q. Yes.

16 A. Okay.

17 Q. We will mark that at the end of the
18 lunch hour as an exhibit.

19 The public document is called the
20 Superfund fact sheet, is it not?

21 A. That's correct.

22 Q. All right.

23 And Boice Deposition Exhibit 51, which
24 is the May 19, 1989 comments by ERM, those are

1 comments on the Superfund fact sheet, are they
2 not?

3 A. Yes.

4 Q. When they say proposed plan, they are
5 referring to the fact sheet which is the basis
6 of the public meeting and presentation of what
7 the proposed remedy is; isn't that right?

8 A. That's correct.

9 Q. Now, I take it your testimony with Mr.
10 Pinch was that you had reached an opinion that
11 ERM was acting in bad faith because they --

12 MR. TENENBAUM: Hold it. I apologize for
13 interrupting in the middle. But, I know that --
14 I know that the witness said impressions of bad
15 faith. I don't know if he said opinion.

16 MR. KARAGANIS: Impression of bad faith.

17 Q. That with regard to your impressions or
18 opinions as to bad faith, one of those
19 impressions was formed by the contradiction, the
20 apparent contradiction that existed between what
21 ERM had said in the feasibility study and what
22 ERM said in its May 19 comments; is that right?

23 A. As I stated before, there were a number
24 of things regarding their performance that

1 contributed to that impression.

2 This is one of the things that
3 contributed to that impression.

4 Q. Now, I believe that in your discussion
5 with Mr. Finch, you compared what was said in
6 the May 19 exhibit, Noice Deposition Exhibit 51,
7 with what was said in the charts which are the
8 feasibility study -- I am sorry, the charts in
9 the feasibility study; is that correct?

10 A. I wouldn't say that they say that.
11 They state what they state in one document
12 compared to what is stated in the other
13 document, as well as statements made by ERM
14 during the feasibility study and Dames & Moore.
15 Statements made verbally, I mean.

16 Q. Now, in the statements that were made
17 to you in the feasibility study -- strike that.

18 I know lawyers never make mistakes, but
19 do engineers make mistakes?

20 A. I think it has occurred, yes.

21 Q. Okay.

22 Do you know if ERM has ever made
23 mistakes?

24 A. Yes.

1 Q. Is it your opinion that they have made
2 mistakes in the past?

3 A. My opinion?

4 Q. Yes.

5 A. I think I would probably be correct if
6 I said yes.

7 Q. Have you ever made mistakes in the
8 past?

9 A. Absolutely.

10 Q. Is that a yes?

11 A. Yes.

12 Q. Is there a difference between an honest
13 mistake and a deliberate deception?

14 A. Yes, there is.

15 Q. When you came across a statement or
16 were provided a statement of fact or engineering
17 judgment in the feasibility study, did you
18 attempt to make an independent determination as
19 to the accuracy of the statement?

20 MR. TENENBAUM: Can you read that back,
21 please.

22 (The record was read.)

23 Well, you are referring to the ones
24 that contributed to his impression of bad faith?

1 MR. KARAGANIS: Any statements, including
2 those.

3 MR. TENENBAUM: If you are not taking about
4 the bad faith issue, then you are seeking
5 discover on record issues.

6 So please answer with respect to the
7 subjects that we have been discussing at this
8 deposition already, the impression of bad faith.

9 A. I would have to see the specific
10 statement he is referring to.

11 BY MR. KARAGANIS:

12 Q. I believe that you testified for Mr.
13 Finch that one of the problems you had was with
14 statements that were made by Dames & Moore,
15 presumably operating under ERM's supervision, in
16 table 4-2 of the feasibility study for Midco I?

17 A. I never said that I had a problem with
18 those statements.

19 Q. But you indicated, I believe, in your
20 testimony that you found ERM's later statements
21 in Exhibit 51 to be inconsistent or
22 contradictory to the statements in table 4-2,
23 did you not?

24 A. That's correct.

1 Q. Which statements did you find to be
2 inconsistent?

3 A. Do we have to go over that again? It
4 is already in the testimony.

5 Q. Yes, I would like to.

6 MR. TENENBAUM: I have to object to that. I
7 thought we were coordinating with other counsel
8 here.

9 If you want to follow up on a specific
10 one of these, that would be fine.

11 MR. KARAGANIS: I want to follow up on the
12 statements in table 4-2.

13 MR. TENENBAUM: Make him go through the
14 whole thing again?

15 MR. KARAGANIS: It is not a long table, it
16 is three pages.

17 MR. TENENBAUM: He has already gone through
18 it once. Why don't you ask him about the ones
19 you are interested in in particular.

20 BY MR. KARAGANIS:

21 Q. I am interested in particular, Mr.
22 Boice, in the statement on alternative 4C, which
23 says that cleanup action levels for soils will
24 not be met as soils remain without treatment.

1 Do you agree or disagree with that
2 statement?

3 MR. TENENBAUM: No foundation has been
4 established.

5 MR. KARAGANIS: That was one of the
6 statements.

7 MR. TENENBAUM: Is this one of the ones that
8 was part of the impression of bad faith?

9 A. Yes.

10 MR. KARAGANIS: Yes.

11 MR. TENENBAUM: All right.

12 A. I agree with that. Yes.

13 BY MR. KARAGANIS:

14 Q. Did you make a technical determination
15 as to whether or not that was a technically
16 accurate statement?

17 MR. TENENBAUM: Is this sentence one of the
18 ones that the witness has identified --

19 MR. KARAGANIS: Yes.

20 MR. TENENBAUM: -- that ERM was inconsistent
21 on?

22 MR. KARAGANIS: Yes.

23 Q. ERM later said that that remedy was an
24 effective remedy and would do the job and the

1 witness pointed to that statement as being
2 inconsistent.

3 Isn't that right, Mr. Boice?

4 A. That was one of the statements, yes.

5 It is not a full description of what we
6 went over previously.

7 We also stated that if it fails, if the
8 cap fails, basically risks at the site are
9 similar to no action.

10 Q. But the first point, I am asking you on
11 the first question, when you received that chart
12 which in its first sentence says that cleanup
13 action levels for soils would not be met by this
14 remedy; did you undertake any independent
15 technical evaluation of the accuracy of that
16 statement?

17 MR. TRENBATH: How is that relevant to bad
18 faith?

19 MR. KARAGANIS: It is relevant to bad faith.
20 It is relevant to whether or not that statement
21 is honest or dishonest or a deception or an
22 honest mistake.

23 A. The bad faith is related to here they
24 said that -- in the next document they said

1 something that contradicts it.

2 That has nothing to do with whether we
3 did an independent evaluation of that particular
4 statement.

5 MR. TENENBAUM: What we will do here, that
6 is, what I think the best thing to do here on
7 this question is to let the witness answer
8 whether there is any technical evaluation or
9 other, something like that, that contributed to
10 his impression of bad faith in addition to
11 just -- in addition to the apparent
12 inconsistency between the two statements.

13 BY MR. KARAGANIS:

14 Q. Mr. Boice --

15 MR. TENENBAUM: That would be right on
16 point. Otherwise, you are seeking discovery on
17 record issues.

18 MR. KARAGANIS: I am seeking discovery as to
19 whether or not Mr. Boice erroneously reached an
20 impression as to bad faith.

21 MR. TENENBAUM: An impression of bad faith
22 is not something that one necessarily
23 erroneously reaches.

24 MR. KARAGANIS: You think it is always

1 accurate, is that true?

2 MR. TENENBAUM: What?

3 MR. KARAGANIS: Was that done at Salem?

4 MR. TENENBAUM: Excuse me.

5 MR. KARAGANIS: Did you ever hear of Mr.
6 McCarthy?

7 MR. TENENBAUM: The witness --

8 There has been no allegation in the
9 complaint of bad faith in the RI/P9.

10 MR. KARAGANIS: The witness has testified at
11 length about impressions of bad faith.

12 MR. TENENBAUM: You and your co-counsel
13 forced the witness to render whether he had an
14 impression of bad faith.

15 MR. KARAGANIS: Mr. Tenenbaum, I think
16 anybody fairly looking at this transcript would
17 not say that this witness, given your repeated
18 instructions not to answer, has been forced to
19 do anything.

20 MR. TENENBAUM: I did not instruct him not
21 to answer.

22 MR. KARAGANIS: He answered and I am
23 following up.

24 MR. TENENBAUM: It was at your insistence

1 that he gave his impressions as to bad faith.

2 MR. KARAGANIS: I am asking whether or not
3 he undertook any technical evaluation of the
4 accuracy of the statement in the first sentence
5 as to alternative 4F in table 4-2.

6 MR. TENENBAUM: That is discover into --

7 MR. KARAGANIS: As opposed to the accuracy
8 of the statements contained in Exhibit 51, which
9 he has testified are inconsistent.

10 Did he ever undertake an investigation
11 as to which was right.

12 MR. KEATING: That would be the issue if one
13 is right and you can show that one is right and
14 it was done in bad faith.

15 Somebody says this is blue, you look at
16 it, you study it. You say it is not blue. You
17 know, did he do it in bad faith.

18 MR. TENENBAUM: Just a second, the
19 contractor has some responsibility when he
20 submits something.

21 MR. KEATING: I am not saying he doesn't
22 have any responsibility.

23 MR. TENENBAUM: It may be, I don't know
24 if -- the witness can only tell you how his

1 impressions are formed.

2 But, it may be when a contractor in an
3 official document submits something to PPA which
4 says black, and then when this contractor comes
5 around and submits a document the next time that
6 says not black, that that in itself may be
7 enough to create an impression of bad faith.

8 MR. KEATING: Sure.

9 MR. KARAGANIS: It also may be a mistake and
10 the question is which one is right and --

11 MR. KEATING: No. I got your question
12 better than you.

13 The question is did he do something to
14 find out which one was right. You know, that is
15 the only issue. If you found out someone was
16 right, then you form your own opinions, oh, he
17 is telling a lie because I found this out. I
18 asked around and I know that this is right.

19 MR. TENENBAUM: That's why I said I would
20 allow the witness to answer whether his
21 impression of bad faith on this particular one
22 was based in part on anything other than the
23 inconsistency in the submission of ERM.

24 MR. KARAGANIS: All right.

1 That's what I am asking him. Did he
2 undertake any evaluation --

3 MR. TENENBAUM: That is not --

4 MR. KARAGANIS: -- of either of the
5 statements?

6 MR. TENENBAUM: That is not what you are
7 asking him. Those are two different questions.
8 That one is objectionable.

9 I will allow him to answer the one that
10 I stated, if you want him to answer it.

11 BY MR. KARAGANIS:

12 Q. Mr. Boice, did you ever attempt to
13 inquire -- strike that. I will lay a foundation
14 first.

15 I take it that the statement at the
16 first sentence with respect to table 4-2 on
17 alternative 4F with respect to the
18 protectiveness of human health is a statement by
19 the contractor that cleanup action levels will
20 not be met for the soil; isn't that right?

21 A. That's correct.

22 Q. Is it your impression that ERM in later
23 advocating alternative 4F was saying that
24 cleanup action levels for the soil would be met?

1 MR. TENENBAUM: Did you mean 4C or?

2 MR. KARAGANIS: I am sorry, is it 4C? 4C, I
3 am sorry.

4 A. We will have to get ERM's comments on
5 exactly what they said again.

6 Q. Here they are.

7 A. This is the another repeat of what we
8 have already gone through.

9 MR. TENENBAUM: I would object to --

10 A. I will have to read this over until I
11 can find the relevant section.

12 MR. TENENBAUM: I don't know how much more
13 you have left to question.

14 I would suggest then the areas that
15 have been covered at great length by counsel for
16 Standard T and other counsel that you might want
17 to save that until the end.

18 MR. KARAGANIS: These are follow-up
19 questions.

20 MR. TENENBAUM: Fine. As long as you don't
21 have anything original.

22 MR. KARAGANIS: I have much that is
23 original, Mr. Tenenbaum.

24 MR. TENENBAUM: I think we should do that

1 first rather than cover ground that has already
2 been covered.

3 MR. KARAGANIS: Mr. Tenenbaum, let me
4 conduct my deposition, please.

5 MR. TENENBAUM: We are on the last day of
6 this nine-day deposition.

7 MR. KARAGANIS: Mr. Tenenbaum, believe me,
8 we are not on the last day of the deposition.

9 MR. TENENBAUM: You are violating the
10 agreement that we have submitted to the court.

11 MR. KARAGANIS: No, I am not.

12 Q. Go ahead.

13 MR. TENENBAUM: Yes, you are.

14 BY MR. KARAGANIS:

15 Q. Go ahead, Mr. Boice.

16 MR. TENENBAUM: We may not have provided the
17 witness for the even three additional days given
18 the lengthy questioning that he has already been
19 subjected to, except you agreed there would only
20 be those three days.

21 Are you now backing away from that
22 agreement?

23 MR. KARAGANIS: Excuse me, Mr. Tenenbaum,
24 may I proceed with my discovery?

1 Q. Go ahead, Mr. Boice.

2 MR. TENENBAUM: There was a cut off of
3 discovery on July 20.

4 MR. FARAGANIS: I have to pay for this
5 transcript. I don't need any additional
6 editorial comments.

7 MR. TENENBAUM: It is important.

8 There was a cuts off of discovery on
9 July 20. We agreed to produce this witness for
10 three additional days upon your
11 representation --

12 MR. FARAGANIS: On my representation that I
13 thought we could get through the material in
14 that period of time, and we might have gotten
15 through the material in that period of time had
16 we not had the level of objection and
17 instructions that you have given, which have
18 filed up this record with extraneous material.

19 MR. TENENBAUM: That is ridiculous.

20 The first two days of this you took up
21 questioning on record issues and made very
22 little progress. You are now covering subjects
23 that have been already covered by Standard T.

24

1 BY MR. KARAGANIS:

2 Q. I believe it is page 6, your earlier
3 testimony referred to page 6 of Exhibit 51.
4 Does that refresh your recollection?

5 A. I am not finished.

6 Q. Perhaps to speed up your deliberation,
7 Mr. Boice, directing your attention to page 138.

8 A. I am not finished yet.

9 Okay. In table 4-2, the inconsistency
10 exists between the May 19, 1990 comments on page
11 5, includes a statement that the adding of soil
12 remediation to groundwater in alternatives 7 and
13 8, or by adding soil remediation to groundwater
14 in alternatives 7 and 8, no further meaningful
15 reduction in risks are attained.

16 That is inconsistent in table 4-2 with
17 the statements cleanup action levels for soils
18 will not be met as soils remains without
19 treatment, and if it fails, risks at the site
20 are similar to no action.

21 Q. All right.

22 Is that because the inconsistency
23 there, is that because alternative 4, I believe
24 it was 4C, would not meet the cleanup action

1 levels for the soil but alternatives 7 and 8
2 would?

3 A. As I stated before, it states here that
4 adding soil remediation to groundwater, this is
5 in the comments, the May 19 comment letter,
6 adding soil solidification to groundwater would
7 result in no further meaningful reduction in
8 risks.

9 Q. All right.

10 You pointed to table 4-2?

11 A. On the other hand, table 4-2 states
12 cleanup action levels for soil will not be met,
13 and if it fails, risks at the site are similar
14 to no action.

15 Q. Let's deal with that first element.
16 The statement in table 4-2 that cleanup action
17 levels in the soil would not be met.

18 Did you ever make an independent
19 determination or analysis as to whether that
20 statement was accurate?

21 MR. TENENBAUM: Same objection. No
22 foundation. Instruct the witness not to answer.

23 BY MR. KARAGANIS:

24 Q. Could you answer that question if you

1 were allowed to?

2 A. Yes.

3 MR. TENENBAUM: As I said earlier, the
4 witness would be able to answer a question
5 asking whether his impression of bad faith was
6 based in part on any such investigation, would
7 be allowed to answer that.

8 BY MR. KARAGANIS:

9 Q. Mr. Roice, I am now directing your
10 attention to page 138 of your testimony in this
11 deposition on July 11, 1990 and I quote:

12 "Since 4A and 4C do
13 not address soil treatment
14 directly they would not
15 address the -- after the
16 groundwater pumping and
17 treatment would be
18 completed, there is no
19 guarantee that we would
20 meet -- in fact, it is very
21 unlikely that we would meet
22 cleanup action levels for
23 the soil which were based on
24 direct action, direct

1 inquest in case the site
2 was developed in the
3 future."

4 MR. TENENBAUM: What date is this?

5 MR. KARAGANIS: July 11, 1990.

6 MR. TENENBAUM: What is the question?

7 BY MR. KARAGANIS:

8 Q. Do you recall giving that testimony?

9 A. I would have to read it and see what
10 context that statement was made in.

11 Q. Please do.

12 Does that refresh your recollection now
13 having read it?

14 Can I have the transcript back, please?

15 Thank you.

16 A. What is the question?

17 Q. There is a question pending, but I will
18 move along.

19 Mr. Boice, would it be a fair layman's
20 understanding of what your concern was, or your
21 impression was, that ERM was saying in the
22 November 13, 1989 document that alternative 4C
23 would meet the required cleanup action levels,
24 when they had said previously or Dames & Moore

1 had said previously in the FS that 4C would not
2 meet the cleanup action levels?

3 MR. TENENBAUM: Same continuing objection.

4 A. Would you repeat the question?

5 (The question was read.)

6 A. And whether that contributed to my
7 impression of bad faith?

8 BY MR. KARAGANIS:

9 Q. Yes.

10 A. Yes.

11 That is part of the information that
12 contributed to my impression of bad faith. Yes.
13 I should note that FRM was overall in charge of
14 the feasibility study at that time.

15 Q. Did you ever make any technical
16 evaluation as to determine whether or not
17 alternative 4C would or would not meet the
18 cleanup action levels?

19 MR. TENENBAUM: Same objection.

20 BY MR. KARAGANIS:

21 Q. Go ahead.

22 MR. TENENBAUM: Same objection and
23 instruction as earlier.

24 If the question is asked, the witness

1 would be permitted to testify as to whether his
2 impression of bad faith is based in part on any
3 such technical evaluation or determination.

4 BY MR. KARAGANIS:

5 Q. Go ahead.

6 MR. TENENBAUM: are you incorporating my
7 question?

8 I did instruct him not to answer the
9 pending question.

10 MR. KARAGANIS: Did you instruct him not to
11 answer?

12 MR. TENENBAUM: Yes.

13 MR. KEATING: Then I got a problem.

14 If somebody testifies as to bad faith,
15 you are going to present it. The only way you
16 can present it is through witnesses. Then we
17 don't know what witnesses you are going to
18 present it through.

19 MR. TENENBAUM: I said he could testify as
20 to whether --

21 What I said was I would allow him to
22 answer, subject to my objection, the question as
23 to whether his impression of bad faith was based
24 in part on such investigation or whatever it was

1 worded.

2 MR. KARAGANIS: The question is before he
3 assumes somebody is acting in bad faith, did he
4 undertake any kind of scientific or technical
5 evaluation as to which statement was correct?

6 A. I think I never assumed that they were
7 acting in bad faith. Their product and
8 performance gave me that impression. That is
9 what I have been testifying to all along.

10 Q. Was there a technical evaluation done
11 as to whether or not there was an inaccuracy in
12 the second statement by FRM?

13 MR. TENENBAUM: Same objection and
14 instruction.

15 MR. KARAGANIS: This is related to bad
16 faith.

17 MR. TENENBAUM: As I have indicated many
18 times, this is a question, you now asked it four
19 or five times, that is asking for the witness
20 to describe the Agency's decision-making
21 process, which is very objectionable.

22 However, subject to my objection, I
23 will allow the witness to answer if you would
24 only rephrase it to ask whether part of his

1 impression of bad faith was based on such a
2 follow-up technical investigation.

3 If he says no, then you will know that
4 is not part of his impression of bad faith. If
5 he says yes, then you can ask him how that was
6 part of his impression of bad faith.

7 BY MR. KARAGANIS:

8 Q. Let me try to move this along.

9 Mr. Roice, in reaching your impression
10 of bad faith, did you undertake any technical
11 evaluation of the comments in either ERM's
12 November 13, 1989 document or in table 4-2?

13 MR. TENENBAUM: As to this comment?

14 MR. KARAGANIS: As to the comment at the top
15 of 4-2.

16 A. Did we undertake any technical
17 evaluation?

18 Q. Yes.

19 MR. TENENBAUM: As part of your impression
20 of bad faith.

21 A. Yes, I reviewed it, and Weston reviewed
22 it and PRC reviewed it.

23 BY MR. KARAGANIS:

24 Q. Did Weston and PRC give you any

1 documents as to their review?

2 A. They gave me --

3 MR. TENENBAUM: Again any documents that you
4 relied on in forming your impression of bad
5 faith.

6 MR. KARAGANIS: Any documents that may be,
7 should be in the record. Were there any
8 documents --

9 MR. TENENBAUM: That's not the question.

10 MR. KARAGANIS: My question is as to
11 documents that are in existence with regard to
12 their technical review of these statements.

13 A. Well, I don't know that their comments
14 would directly address, for example, this top
15 statement in table 4-2 under alternative 4C,
16 since if they didn't disagree witness, why would
17 they comment on it. But, they did review it.

18 Q. Mr. Boice my question is are there any
19 documents reflecting the review by PRC and
20 Weston of table 4-2 or the November 13, 1989 FRM
21 statement?

22 MR. TENENBAUM: Same objection.

23 BY MR. KARAGANIS:

24 Q. Go ahead.

1 A. Yes.

2 Q. Are those documents contained in the
3 Boice Deposition Exhibit No. 3?

4 MR. TENENBAUM: Same objection.

5 A. That's correct.

6 BY MR. KARAGANIS:

7 Q. They are in the index?

8 A. Yes.

9 Q. Would you identify where they are in
10 the index and the dates of those documents?

11 A. Okay. But, this will take a little
12 while.

13 Q. Then we will come back to that one
14 later.

15 Mr. Boice, I take it, I am now
16 referring to pages 140 and 141 of the transcript
17 of July 11, that in contrast to alternative 4,
18 the FS at table 4-2 says that as to alternatives
19 7 and 8, that all risks are reduced below
20 acceptable levels and permanently and
21 significantly reduces the mobility of
22 contaminants in the soil and groundwater, which
23 is your quotation from table 4-2 on page 141.

24 A. Is there a question?

1 Q. I wanted to refresh your recollection
2 with respect to this. Now, here is the
3 question.

4 Did you or anybody acting on your
5 behalf, either inside or outside the Agency,
6 ever make a determination as to whether
7 alternatives 7 or 8 would meet cleanup action
8 levels for soil above groundwater?

9 MR. TENENBAUM: Again I will have to object
10 and instruct the witness not to answer unless
11 the question -- but I will indicate that I would
12 allow the witness to answer as to whether any
13 such investigation was part of his impression of
14 bad faith.

15 MR. KARAGANIS: Mr. Tenenbaum, I suggest you
16 very carefully review your instruction

17 It is based -- and I am stating this as
18 an officer of the court.

19 Based on my best information at this
20 point in time, the statements that are contained
21 in the ROD for Midco I and II, in each ROD for
22 Midco I and II, which include these tables by
23 the way as their primary exhibits for the
24 remedy, the tables that are in the FSS and the

1 statements in the PSs, namely, that, "cleanup
2 action levels for soil above groundwater will be
3 met--"

4 The quote begins, quote, "cleanup
5 action levels for soil above groundwater will be
6 met," that is located in table 4-2 under
7 alternative 7, also located in table 4-2 under
8 alternative 8, are inaccurate statements.

9 They are statements that reflect a
10 mistake on the part of the contractor who
11 submitted them.

12 They also reflect either a compounding
13 of that mistake by the EPA people and EPA
14 consultants, that would include PRC and Weston,
15 but they result in a mistake that is requiring
16 us to perform work, perform a remedy. I take
17 it, the ROD says that we are supposed to meet
18 cleanup action levels, when EPA knew or should
19 have known that the cleanup action levels cannot
20 be met by the remedy selected.

21 So we are being asked to proceed on the
22 basis of a false premise, which will cause us to
23 violate the law from the start.

24 MR. TENENBAUM: Well, I am not commenting on

1 your statement.

2 I am sure that the Agency's decisions
3 can be evaluated on the basis of what is in the
4 record. But let me --

5 MR. KARAGANIS: I will follow that up.

6 I would like to find out where there is
7 one iota in the record of Agency support for the
8 statement that cleanup action levels for the
9 soils will be met by alternatives 7 and 8. If
10 you can show it to me, Mr. Tenenbaum, if or Mr.
11 Boice can, I will be happy to see it.

12 MR. TENENBAUM: If I may finish.

13 In light of what you have just said, I
14 would ask given that the table, I think you have
15 indicated, was submitted to the Agency as on
16 behalf of American Can and other defendants, as
17 to -- if you are now contending that it was
18 submitted erroneously.

19 MR. KARAGANIS: No.

20 MR. TENENBAUM: How you would propose to
21 remedy that situation?

22 MR. KARAGANIS: I am suggesting that both
23 the engineers who worked for the defendants and
24 the engineers who worked for the Agency made a

1 good faith but somewhat egregious misstatement
2 of the English language, that had they gone and
3 looked behind that statement, they would have
4 found that the soil cleanup action levels will
5 not be met by alternatives 7 or 9.

6 MR. TENENBAUM: Obviously I am not here to
7 give the Agency's --

8 MR. KARAGANIS: I am not here to violate the
9 law either. That is what your ordering us to
10 do.

11 MR. TENENBAUM: I am not here to give the
12 Agency's response to what you said. But --

13 MR. KARAGANIS: You are instructing the
14 witness not to answer.

15 MR. TENENBAUM: Let me just follow up in
16 response to what you said, since you made a
17 statement on the record.

18 If one were to assume what you said is
19 correct, and that this information submitted to
20 the Agency is erroneous, I would think that
21 American Can and the other defendants would have
22 some obligation to do something, to offer to do
23 something to remedy what they contend --

24 MR. KARAGANIS: We did, Mr. Tenenbaum.

1 We have been repeatedly offering to do
2 a remedy which we believe will address the
3 legitimate concerns of the Agency, and we are
4 under an order which, from the best
5 investigation I can make as a lawyer for one of
6 the defendants, asks us to do something that
7 cannot be physically achieved with that remedy
8 and, therefore, would require us to violate the
9 law and misstate facts to the court.

10 MR. TENENBAUM: I don't want to really get
11 into too long of discussion of this.

12 But, if what you are telling me is that
13 the defendants now believe that information they
14 submitted to the Agency pursuant to the partial
15 consent decree is incorrect, then I don't know
16 what -- offhand I don't know what obligations
17 are.

18 MR. KARAGANIS: What I am saying, I am
19 alerting you to this in this deposition of
20 record, is that neither the Agency nor the
21 consultants did a technical evaluation of the
22 accuracy of the statements.

23 Our consultants have advised us that
24 the technical information that is in the record

1 does not support that statement, and I am now
2 asking -- and when I say did not support the
3 statement, did not support the conclusion that
4 cleanup actions in the soils will be met.

5 O. I am going to ask this witness now, Mr.
6 Boice, is there anything in this record, the
7 entire Boice Deposition Exhibit No. 3, or any of
8 the documents reflected therein, that provides
9 any evidentiary support for the statements in
10 table 4-2 of the FS for Midco I -- the same
11 statement is contained in table 4-2 in the FS of
12 Midco II -- I quote, "that cleanup action levels
13 for soil above groundwater will be met," for
14 alternatives 7 and 8?

15 MR. TENENBAUM: Again I will have to object
16 and instruct the witness not to answer, because
17 you are seeking to take discovery into the --

18 MR. KARAGANIS: I am seeking to find out
19 whether there is any Agency support for that.

20 MR. TENENBAUM: Isn't that discovery into
21 the basis for the Agency's decision?

22 MR. KARAGANIS: No. Either you got it in
23 the record, Mr. Tenenbaum, or you don't. If you
24 don't, fess up.

1 MR. TENENBAUM: If it is in the record?

2 MR. KARAGANIS: I am asking you as an
3 officer of the court to share the information
4 where in the record it is. I can't find it.

5 I have done a deliberate and thorough
6 search of the record. I am asking you your
7 assistance as an officer of the court to provide
8 me the information. I have done a deliberate
9 and thorough search and I can't find it.

10 You are unable to do so?

11 MR. TENENBAUM: I am not a technical person
12 and the deposition of Mr. Boice is not the
13 appropriate time for me to respond to that.

14 Let me say what I would suggest is you
15 have indicated I think that this was set in
16 motion by the defendants, this alleged mistake
17 you are talking about.

18 Let me ask you this, then, if you want
19 to request something of us to assist you in
20 finding something in the record, then maybe we
21 should set up a meeting of some sort in which we
22 can further discuss this. But, I am not
23 prepared off the top of my head.

24 MR. KARAGANIS: I will be happy to meet with

1 you at any time. But, I am not going to advise
2 my client and I will formally advise them not to
3 comply with an order that says to do something
4 that is impossible and would lead us into a
5 known illegality at the start of the order.

6 MR. TENENBAUM: That is your position. And
7 I am sure we will have ample opportunity to
8 debate that before the court.

9 I would suggest if your client has
10 submitted erroneous information to the Agency,
11 to take whatever steps --

12 MR. KARAGANIS: Excuse me.

13 MR. TENENBAUM: -- to correct them.

14 MR. KARAGANIS: I disagree strongly --

15 MR. TENENBAUM: Excuse me.

16 MR. KARAGANIS: -- with any statements that
17 say my client has submitted anything --

18 MR. TENENBAUM: I said if.

19 MR. KARAGANIS: What I am saying, what I am
20 asking Mr. Boice is did you do --

21 (Conference between the witness
22 and his counsel.)

23 Q. Mr. Boice, did you undertake or is
24 there any record support, factual support, for

1 the statement that cleanup action levels for
2 soil above groundwater will be met by
3 alternatives 7 and 8 as shown in table 4-2 of
4 the Midco I FS?

5 MR. TENENBAUM: Well, again I will have to
6 object and instruct the witness not to answer.

7 You will have same people opportunity
8 to present to the court the basis for the
9 Agency's decision, and that will be reviewed by
10 the court under the arbitrary and capricious
11 standard.

12 BY MR. KARAGANIS:

13 Q. Mr. Boice --

14 MR. TENENBAUM: Again, if you would like
15 to --

16 BY MR. KARAGANIS:

17 Q. If you were allowed to answer that
18 question, Mr. Boice, could you answer it?

19 MR. TENENBAUM: If you would like to enter
20 into settlement discussions in light of what you
21 have described, feel welcome to discuss that
22 with us. But, we are not going to do it on the
23 record.

24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

BY MR. KARAGANIS:

Q. Mr. Boice, if you were allowed to answer that question, could you?

A. Yes.

MR. KARAGANIS: Take a lunch break. Try and get back at 1:00, we do it quickly.

(Whereupon a recess was taken until 1:30 o'clock p.m. of the same day.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

) Civil Action
) No. N-79-556
) Third-Party
) Complaint

MIDWEST SOLVENT RECOVERY INC.;
MIDWEST INDUSTRIAL WASTE DISPOSAL
COMPANY, INC.; INDUSTRIAL TECTONICS,
INC.; V & E CORPORATION; ERNEST DE
HART; EDWARD D. CONLEY; HELGA C.
CONLEY; LOUIE DE HART; CHARLES A.
LICHT; DAVID E. LICHT; DELORES LICHT;
EUGENE KLISIAK; JEANETTE KLISIAK;
LUTHER G. BLOOMBERG; ROBERT J. DAN-
SON, JR.; JOHN MILETICH; MARY
MILETICH; PENN CENTRAL CORPORATION;
INSILCO CORPORATION; RUST-OLEUM, INC.;
ZENITH RADIO CORPORATION; STANDARD T
CHEMICAL COMPANY, INC.; AMERICAN CAN
COMPANY, INC.; PRE FINISH METALS, INC.;
PREMIER COATINGS, INC.; MOTOROLA, INC.;
and DESOTO, INC.;

Defendants.

AMERICAN CAN COMPANY, INC.,
DESOTO, INC., INSILCO CORPORATION,
MOTOROLA, INC., PRE FINISH METALS,
INC., PREMIER COATINGS, INC.,
RUST-OLEUM, INC., STANDARD T
CHEMICAL COMPANY, INC.,
ZENITH RADIO CORPORATION, JOHN
MILETICH, MARY MILETICH and THE
PENN CENTRAL CORPORATION,

Third-Party Plaintiffs,

vs.

ACCUTRONICS, ACTIVE SERVICE CORP.,
AMERICAN NAMEPLATE & DECORATING CO.,

1 AMERICAN PRINTER & LITHOGRAPHER CO.,)
 AMERICAN RIVET COMPANY, AFPCO,)
 2 APPROVED INDUSTRIAL REMOVAL, INC.,)
 ARMOUR PHARMACEUTICAL, ARTISAN HAND)
 3 PRINTS, ASHLAND CHEMICAL CO.,)
 AVENUE TOWING COMPANY, BARR &)
 4 HILES, INC., BELDEN ELECTRICAL)
 PRODUCTS DIV. OF COOPER INDUSTRIES,)
 5 INC., BRETFORD MANUFACTURING, INC.,)
 BUTLER SPECIALTY COMPANY, INC.,)
 6 BY PRODUCTS MANAGEMENT, CALUMET)
 CONTAINER, CARGILL, INC.,)
 7 CHEMALLOY DIVISION OF FISHER- CALO)
 CHEMICAL CO., CHICAGO ETCHING CORP.,)
 8 CHICAGO NAMEPLATE COMPANY,)
 CHICAGO ROTOPRINT CO.,)
 9 C & C INDUSTRIAL MAINTENANCE CORP.,)
 CITY OF GARY, INDIANA, C.P. CLARE)
 10 DIVISION OF GENERAL INSTRUMENTS)
 CORP., C.P. HALL CO.,)
 11 C.P. INORGANICS, COMMANDER PACKAGING,)
 CONNOR FOREST INDUSTRIES, CONSERVA-)
 12 TION CHEMICAL, CONSUMERS PAINT)
 FACTORY, INC., CONTINENTAL)
 13 WHITE CAP DIVISION OF CONTINENTAL)
 CAN COMPANY, CONVERSIONS BY GERRING,)
 14 COUNTY OF DU PAGE, ILLINOIS,)
 CRONAME, INC., CROWN CORK & SEAL)
 15 CO., INC., CULLIGAN INTERNATIONAL)
 COMPANY, CULLIGAN WATER CON-)
 16 DITIONING, INC., FRANK J. CURRAN,)
 CUSTOM METALS PROCESSING,)
 17 DAP, INC. OF BEECHAM COSMETICS,)
 DAUBERT CHEMICAL COMPANY,)
 18 DEUBLIN COMPANY, DOBSON CONSTRUCTION)
 INC., DUO FAST CORPORATION, DU-TONE)
 19 CORP., HAROLD EGAN, ERCO HOUSEWARE)
 CO., EL-PAC, INC., EMROSOGRAPH DIS-)
 20 PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
 ETHICON, INC., FELT PRODUCTS MFG. CO.,)
 21 FLINT INK CORP., FURNAS ELECTRIC)
 CO., GEARMASTER DIVISION, EMERSON)
 22 ELECTRIC, THE GILBERT & BENNETT)
 MFG. CO., GLD LIQUID DISPOSAL,)
 23 HENRY PRATT COMPANY, J.M. HUBER)
 CORPORATION, HYDRITE CHEMICAL CO.,)
 24 INTAGLIO CYLINDER SERVICE, INC.,)

1 JOHNSON & JOHNSON, J & S TIN MILL)
 PRODUCTS, KNAACK MFG. CO., LANSING)
 2 SERVICE CORPORATION, LAUTTER)
 CHEMICAL, LIQUID DYNAMICS,)
 3 LIQUID WASTE, INCORPORATED,)
 STEVE MARTEL, MASONITE CORPO-)
 4 RATION, McWHARTER CHEMICAL CO.,)
 METAL RECLAIMING CORPORATION,)
 5 METROPOLITAN CIRCUITS,)
 MIDWEST RECYCLING COMPANY, MONTGOMERY)
 6 TANK LINES, MORTON THIOKOL INC.,)
 MR. FRANK, INC., NAHSCO, INC.,)
 7 NATIONAL CAN CORPORATION, NAZ-DAR CO.,)
 NUCLEAR DATA, INC., PPG INDUSTRIES,)
 8 INC., PASLODE COMPANY, PIERCE & STEVENS)
 CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
 9 PREMIER PAINT CO., PYLE-NATIONAL CO.,)
 R-LITE, REFLECTOR HARDWARE CORP.,)
 10 REGAL TUBE, RELIANCE UNIVERSAL, INC.,)
 RICHARDSON GRAPHICS, JOHN ROSCO,)
 11 ROZEMA INDUSTRIAL WASTE, ST. CHARLES)
 MANUFACTURING, SCHOLLE CORPORATION,)
 12 SCRAP HAULERS, SHERWIN WILLIAMS)
 COMPANY, SHELD COATINGS, INC.,)
 13 SIZE CONTROL COMPANY, SKIL CORPORA-)
 TION, SPECIAL COATINGS CO.,)
 14 SOUTHERN CALIFORNIA CHEMICAL,)
 SPECIALTY COATINGS, INC.,)
 15 SPOTNAILS, INC., STAR TRUCKING, STERN)
 ELECTRONICS, INC., JOE STRAUSNICK,)
 16 STUART CHEMICAL & PLANT, INC.,)
 SUMMER & MACE, SUN CHEMICAL,)
 17 SYNTech WASTE TREATMENT CENTER,)
 T.R.C., TREPAC, INC., ALFRED TENNY,)
 18 THIERL-ENGDAHL, INC., THOMPSON)
 CHEMICALS, TIFFT CHEMICALS,)
 19 TOWNRY DISPOSAL, TRIPLE S. MERCHANTS,)
 UNIROVAL, INC., UNITED RESIN AD-)
 20 HESIVRS, INC., U.S. ENVELOPE, U.S.)
 SCRAP AND DRUM, U.S. STEEL CORP., UNI-)
 21 VERSAL RESEARCH LABORATORIES, INC.,)
 UNIVERSAL TOOL & STAMPING COMPANY,)
 22 VANDER MOULEN DISPOSAL, VELSICOL)
 CHEMICAL CORP., VICTOR GASKET)
 23 DIVISION OF DANA CORPORATION,)
 WARNER ELECTRIC BRAKE & CLUCH CO.,)
 24 WARWICK CHEMICAL, WASTE RESEARCH &)

1 RECYCLING, XEROX CORPORATION, and)
2 other unidentified persons,)

3 Third-Party Defendants.)
4
5
6

7 DEPOSITION OF RICHARD E. NOICE
8

9 August 3, 1990
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

1
2
3
4
5
6 The continued deposition of RICHARD
7 EDWIN ROICE, called for examination by the
8 Defendants, pursuant to notice and pursuant
9 to the provisions of the Federal Rules of
10 Civil Procedure of the United States
11 District Courts, pertaining to the taking
12 of depositions for the purpose of
13 discovery, taken before Arnold N.
14 Goldstine, a Notary Public and Certified
15 Shorthand Reporter within and for the
16 County of Cook and State of Illinois, at
17 227 West Monroe Street, on August 3, 1990,
18 commencing at the hour of 2:45 o'clock p.m.
19
20
21
22
23
24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

APPEARANCES:

Mr. Alan S. Tenenbaum and
Mr. Leonard M. Gelman
Trial Attorney
Environmental Enforcement Section
Land & Natural Resources Division
U.S. Department of Justice
P. O. Box 7611
Ben Franklin Station
Washington, D. C. 20044

-and-

Mr. Michael R. Berman
Assistant Regional Counsel
Solid Waste & Emergency Response Branch
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

-and-

Peter W. Moore
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
Office of Regional Counsel
230 South Dearborn Street
Chicago, Illinois 60604

appeared on behalf of Plaintiff,
United States of America;

1 **APPEARANCES (CONTINUED):**

2
3 Mr. Michael R. Blankshain
4 Wildman, Harrold, Allen & Dixon
5 225 West Wacker Drive
6 Chicago, Illinois 60606-1229

7 appeared on behalf of
8 Penn Central Corporation;

9 Mr. Robert M. Olian
10 Sidley & Austin
11 One First National Plaza
12 Chicago, Illinois 60603

13 appeared on behalf of
14 Pre Finish Metals, Inc.;

15 Mr. Jeffrey C. Fort and
16 Mr. Carl R. Hillemann
17 Sonnenschein Nath & Rosenthal
18 One Mercantile Center
19 Suite 2600
20 St. Louis, Missouri 63101

21 appeared on behalf of
22 Desoto, Inc.;

23 Mr. Joseph V. Karaganis
24 Karaganis & White, Ltd.
 414 North Orleans Street
 Chicago, Illinois 60610

 appeared on behalf of
 American Can Company, Inc.;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

APPEARANCES (CONTINUED):

Mr. James T. J. Keating
Law Offices of James T. J. Keating, P.C.
Printers Row
542 South Dearborn Street
Chicago, Illinois 60605

appeared on behalf of
Premier Coatings, Inc.;

Mr. Edward J. Leahy
Leahy, Eisenberg & Fraenkel, Ltd.
309 West Washington Street
Chicago, Illinois 60606

appeared on behalf of
Scholle Corp.;

Mr. Craig Zimmerman
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606-5096

appeared on behalf of Standard T
Chemical Company;

1 **APPEARANCES (CONTINUED):**

2
3 **Mr. Daniel R. Fritz**
4 **Taylor, Miller, Sprowl, Hoffnagle &**
5 **Merletti**
6 **33 North LaSalle Street**
7 **Chicago, Illinois 60602-2602**

8 **appeared on behalf of Third-**
9 **Party Plaintiffs Desoto, et al.**
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

1 MR. KARAGANIS: Let's go briefly on the
2 record.

3 I have informed Mr. Tenenbaum, counsel
4 for the government, that I have not been feeling
5 well since late yesterday afternoon.

6 I was ill last evening and proceeded
7 this morning so as to avoid any excessive
8 inconvenience to the government who was here
9 from out of town.

10 I am not feeling well now and I am in
11 the kind of shape where I have to leave, and I
12 have discussed this with Mr. Tenenbaum and asked
13 to arrange another date and complete my
14 examination.

15 He has agreed to tentatively schedule
16 it for Friday of next week. If Friday turns out
17 to be a conflict, I am agreeable to schedule
18 another day, but at this point I am going to put
19 my examination of Mr. Boice into recess.

20 MR. TENENBAUM: My agreement in this
21 connection is contingent on counsel for American
22 Can endeavoring to do his best efforts to
23 question only on areas that have not already
24 been covered.

1 And, furthermore, the deposition, it is
2 our position that the reopening of the
3 deposition on next Friday will be limited to
4 American Can Company and any cross examination
5 in response to the questioning by American Can
6 Company.

7 We intend to proceed today to finish
8 with anyone else's questioning.

9 MR. KARAGANIS: At this point I am recessing
10 until next Friday.

11 MR. FORT: Mr. Tenenbaum, Jeff Fort on
12 behalf of Desoto.

13 I take exception to your statement that
14 it can only be American Can who completes their
15 questioning next week.

16 It is now quarter until 2 on Friday
17 afternoon, and I have agreed to let others go
18 forward and I have also agreed to do everything
19 I can to avoid any duplication. But, given the
20 time that it is, and I know this witness has
21 been here for the two previous days, that I am
22 not sure that I am going to be able to complete.
23 I certainly hope to, and it reasonably might be
24 possible to do it. But, I just want to note my

1 exception to your statement.

2 MR. TENENBAUM: I would note in response for
3 the record that you as well as the other
4 defendants agreed that this deposition would
5 take place in three days.

6 There was a discovery cut off on July
7 20, and our agreement to a limited extension of
8 that discovery was conditioned on the three-day
9 limitation. You have had at least one and maybe
10 two, I can't remember, opportunities to already
11 question the witness. This is your second or
12 third go around. So I hoped that we would be
13 all finished up today.

14 MR. FORT: Okay.

15 DIRECT EXAMINATION

16 BY MR. FORT:

17 Q. Mr. Boice, I would like to ask you a
18 few questions with respect to your knowledge of
19 the environmental conditions at the site as they
20 relate to my client, Desoto, and the extent to
21 which Desoto has any responsibility, alleged
22 responsibility, for materials at the site.

23 I believe you have testified earlier
24 that you were not familiar on a firsthand basis

1 with whether Desoto had sent waste to the site
2 or not?

3 A. I testified to that -- wait a minute
4 now. What did you say?

5 Q. Would you read it back.

6 (The record was read.)

7 A. What does firsthand basis mean?

8 Q. Why don't you tell me the general, the
9 extent to which you have any knowledge as to
10 whether or not Desoto sent waste that was
11 received at the Midco sites?

12 MR. TENENBAUM: Didn't we already cover
13 that?

14 MR. PORT: Just a preliminary.

15 MR. TENENBAUM: That's preliminary, that I
16 believe he has testified on for a long time.

17 MR. PORT: Counsel, it is going to be
18 difficult for anybody to make sense of this.

19 MR. TENENBAUM: Why don't we just stipulate
20 that whatever he has already testified to, he
21 has testified to. We can get it out if we have
22 to.

23 BY MR. PORT:

24 Q. Mr. Boice, what is the nature of your

1 knowledge on this topic?

2 MR. TENENBAUM: Objection. Asked and
3 answered.

4 A. My knowledge of the Agency's liability
5 information?

6 BY MR. FORT:

7 Q. Why don't we start with your knowledge
8 concerning the Agency's liability information,
9 even if it is second-hand or something that you
10 read in a deposition transcript.

11 MR. TENENBAUM: Objection, asked and
12 answered.

13 A. USEPA's liability information includes
14 documents from Dehart and Intec, which includes
15 shipping documents, check receipts, memos,
16 notes, vouchers and other types of business
17 documents. The Midco log.

18 It includes response of Desoto to 104 R
19 requests from USEPA. Response of Desoto to
20 interrogatories. Response of Desoto to requests
21 for admission. Permits and permit applications.
22 Depositions, interviews and transcripts.

23 BY MR. FORT:

24 Q. As to those things you have just

1 mentioned, you do not have firsthand knowledge
2 as to whether or not wastes from Desoto actually
3 were received at the Midco sites?

4 MR. TENENBAUM: As to those things he
5 mentioned?

6 MR. FORT: Yes.

7 A. What do you mean?

8 Q. Did you see any trucks arrive with a
9 drum with the label that this came from the
10 Desoto plant?

11 A. No. I wasn't on the site during any of
12 the Midco operation.

13 Q. You only came on to the site after the
14 Midco operations had ceased, correct?

15 A. That's correct.

16 Q. While you were on the site, at any time
17 did you see any drums with a label on it saying
18 this drum came from the Desoto plant?

19 A. No.

20 Q. Did you see any other types of
21 information or evidence or a drum at the site
22 that any material had originated at a Desoto
23 plant?

24 MR. TENENBAUM: This is him personally, is

1 that right?

2 MR. FORT: Yes.

3 A. No.

4 BY MR. FORT:

5 Q. Do you have any other firsthand
6 information, information that you saw, that you
7 observed, in terms of the site that would
8 suggest that Desoto, a Desoto plant had sent
9 wastes to the site?

10 MR. TENENBAUM: Again, this has been asked
11 and answered and I reincorporate all the
12 objections I made at the previous round of this
13 questioning.

14 A. You mean that I directly saw and not
15 something I read?

16 BY MR. FORT:

17 Q. Right.

18 A. No.

19 Q. Is your only information concerning any
20 waste or any liability of Desoto relating to
21 things that you have read in documents,
22 documents prepared by others or deposition
23 transcripts?

24 A. That's all the information I have, yes.

1 knowledge I have.

2 Q. Okay.

3 Let me shift a little bit here and let
4 us assume that those documents show that there
5 were hazardous substances or there is other
6 information that would suggest that hazardous
7 substances from a Desoto plant were given to the
8 Midco entities or Intec entities.

9 You are familiar with the information
10 of the Midco operations and Intec's operations
11 and their business records, I believe?

12 MR. TENENBAUM: He is familiar with them
13 firsthand?

14 MR. FORT: No. He is familiar with them
15 because he has read them.

16 MR. TENENBAUM: Well, I guess you can answer
17 that.

18 A. Yes, I have read, I have seen the
19 shipping document. The Midco log. I have read
20 some depositions and summaries of the site
21 operation.

22 BY MR. FORT:

23 Q. Now, with respect to potential
24 liability of Desoto, with respect to the

1 materials that may have been in the Desoto
2 waste. Assuming that the evidence at trial
3 would show that a material in that waste was
4 toluene, you are generally familiar with the
5 characteristics of toluene?

6 I believe, are you not?

7 A. Yes.

8 Q. And you are also familiar with the
9 sampling that was done at the Midco sites, are
10 you not?

11 MR. TENENBAUM: Which sampling?

12 MR. FORT: Any of the sampling.

13 MR. TENENBAUM: Any of it.

14 A. In general, yes.

15 BY MR. FORT:

16 Q. What is your familiarity with the
17 sampling at the Midco sites, what is your
18 general knowledge of that?

19 A. I have been remedial project manager
20 for the Midco site since 1985. So in that -- I
21 did some direct observation of the sampling on
22 the site, and Weston oversaw almost all the
23 sampling on the site and reported the progress,
24 their observations regarding the sampling.

1 I reviewed the quality assurance
2 project plan and participated in the approval of
3 the quality assurance project plan for the
4 sampling.

5 Q. I am sorry, go ahead.

6 A. I read all the reports, interim reports
7 submitted on the sampling. I have read the
8 remedial investigation. And regarding the
9 previous sampling on the site, I have read
10 some -- all the reports I have been able to find
11 on the previous sampling.

12 Q. So you are familiar with the results of
13 the various sampling activities that have
14 occurred at the sites, are you not?

15 MR. TENENBAUM: Asked and answered.

16 A. In general.

17 BY MR. FORT:

18 Q. Okay.

19 And is it your recollection that the
20 material toluene has been detected at the site?

21 A. Yes.

22 Q. Do you have any information that would
23 say that the toluene detected at the site is a
24 hazardous substance that originated at a Desoto

1 plant?

2 MR. TENENBAUM: Objection to the extent it
3 seeks expert testimony.

4 A. In a sense, yes. In that we know
5 that -- we have shipping documents showing that
6 shipments of hazardous waste, which contained
7 toluene, I presume, came from the Desoto plant.

8 We have depositional evidence that
9 wastes were dumped on the site.

10 We know the fires occurred on the site
11 that caused leakage of drums on the site, and
12 release of chemicals into the groundwater and
13 the soils. And we have the analyses during the
14 remedial investigation feasibility study and
15 some previous samplings that detected toluene as
16 well as other hazardous substances on the site.

17 Q. Okay.

18 Now, you are also obviously familiar
19 with the remedial actions that the Agency has
20 identified as being appropriate here, are you
21 not?

22 A. Yes.

23 Q. Okay.

24 What evidence is there that toluene is

1 associated with any need identified by EPA for
2 solidification of the soil material at the site?

3 MR. TENENBAUM: One second.

4 MR. FORT: Are you going to object?

5 MR. TENENBAUM: I am thinking.

6 MR. KEATING: Are we waiting for an
7 objection? My general rule of thumb is if it
8 takes that long, it is probably not going to be
9 a good one.

10 MR. TENENBAUM: Can you read the question
11 back, please.

12 (The record was read.)

13 Correct me if I am wrong, but doesn't
14 that seek expert testimony, expert opinion?

15 MR. FORT: I don't know. Is that an
16 objection?

17 MR. TENENBAUM: Yes.

18 I think this is not a notice of a
19 deposition of an expert and he has not been
20 designated as an expert on that subject.

21 MR. FORT: Okay.

22 Q. You may answer the question.

23 MR. TENENBAUM: Well, I don't think I am
24 going to allow him to answer the question on

1 that, that requires expert testimony unless -- I
2 think our expert on that will testify on that,
3 and you will have a chance to take his
4 deposition.

5 MR. FORT: I asked him what evidence is
6 there. I didn't ask him for an opinion. I
7 asked him for facts. This man knows the facts,
8 he knows the sampling data.

9 MR. TENENBAUM: In order to answer that
10 question, you have to give an expert opinion.

11 MR. KEATING: He just wants to find out what
12 he looked at.

13 MR. FORT: Wait a minute.

14 The question is what evidence is there
15 that toluene is associated in any way with any
16 need identified by EPA for the solidification of
17 the soil material.

18 MR. TENENBAUM: I suppose that an expert
19 testifying on this subject might have to rely on
20 subsidiary facts, but I am trying to think as to
21 whether this witness would have firsthand
22 knowledge of such facts.

23 I think it is entirely objectionable.
24 But, on the off chance that somehow there is --

1 the whole question, but I am going to let him
2 try and do that.

3 If you want to help him out with
4 rephrasing your question, you can also do that.
5 But, I am objecting to the question in its
6 entirety, but I will let the witness discuss any
7 facts about site conditions that might somehow
8 be relevant to that. By saying so, the witness
9 is not rendering an opinion that they are
10 relevant.

11 MR. PORT: Mr. Tenenbaum, we have just taken
12 two pages of transcript to state an objection
13 that you think it is an expert opinion.

14 I would like to have the witness answer
15 the question.

16 MR. TENENBAUM: I am trying to accommodate
17 you to let the witness testify to avoid the
18 obvious objection to your question.

19 Now, if you want to, let me ask you
20 this. Will you produce a Desoto non-expert
21 witness who will answer the same question?

22 MR. PORT: Mr. Boice, there is a question
23 pending.

24 MR. TENENBAUM: I want to note for the

1 record that counsel for Desoto has not indicated
2 any willingness to do that.

3 MR. FORT: I think that is irrelevant as to
4 whether or not we are going to do that. On a
5 fact basis, this is a person who knew about all
6 the sampling information, he just testified he
7 was generally familiar with it all.

8 If he doesn't know, maybe somebody else
9 does, but the question is does this person no.

10 Q. Mr. Boice, do you know?

11 MR. TENENBAUM: Subject to my objection, you
12 may try and answer.

13 A. The question was whether toluene --
14 what was the question again?

15 BY MR. FORT:

16 Q. Rather than making the court reporter
17 go all the way back -- how many pages it is?
18 Let me try it again.

19 What evidence is there that toluene is
20 associated with any need identified by EPA for
21 solidification of soil material at the Midco
22 sites?

23 MR. TENENBAUM: Same objection.

24 A. At both Midco I and Midco II?

1 BY MR. FORT:

2 Q. If they are different, you may answer
3 differently, yes.

4 A. Toluene is a volatile organic compound,
5 so most likely that would -- the treatment that
6 would be most relevant to addressing toluene
7 concentrations, which were quite high in the
8 soils, as well as in the groundwaters, would be
9 the soil vapor extraction step.

10 To some extent and this will depend on
11 the results of the treatability study, toluene
12 also may be addressed by the solidification.

13 Q. Would toluene also be addressed by
14 groundwater extraction?

15 MR. TENENBAUM: Same objection.

16 A. As far as I can remember, toluene was
17 also highly contaminated. High concentrations
18 in the groundwater. So it would also be
19 withdrawn during the groundwater treatment and
20 have to be treated.

21 BY MR. FORT:

22 Q. So toluene would be addressed by
23 groundwater extraction and treatment, is that
24 correct?

1 MR. TENENBAUM: Can I have a continuing
2 objection to this whole line of questioning?

3 MR. FORT: Yes.

4 A. That's correct.

5 The groundwater, the toluene in the
6 groundwater would be addressed by the
7 groundwater pumping and treatment system.

8 Q. Okay. Let me ask as to another
9 material.

10 If the evidence indicated that xylene
11 was a substance in the Desoto waste, I would ask
12 you this question. What evidence are you aware
13 of that xylene is associated with any need
14 identified by the Agency for solidification of
15 soil material at either the Midco I or the Midco
16 II sites?

17 MR. TENENBAUM: Continuing objection.

18 A. My answer is basically the same for
19 xylene as it was for toluene.

20 BY MR. FORT:

21 Q. So that as for xylene, xylene would
22 also be addressed by a groundwater extraction
23 and treatment system, correct?

24 A. The xylene in the groundwater would be

1 addressed. Yes.

2 Then in the soils, it would primarily
3 be addressed, preferably be addressed by the
4 soil vapor extraction system.

5 Q. It would be preferably addressed by
6 soil vapor extraction?

7 A. Yes. Because that provides a permanent
8 removal of the xylene.

9 Q. Well --

10 A. There might be some reduction in
11 mobility of xylene due to solidification.
12 That's something that would be determined during
13 the treatability study.

14 Q. Wouldn't groundwater pumping and
15 treatment of that groundwater also remove the
16 xylene, even if it were still in the soils?

17 A. It would only remove xylene from the
18 groundwater.

19 Q. Okay.

20 Will there not be continued rainfall
21 over the site?

22 A. Yes.

23 Q. And would not that rainfall continue to
24 remove the xylene from the soils and into the

1 groundwater?

2 A. Yes, to some degree.

3 Q. Okay.

4 And if that groundwater were continued
5 to be extracted and treated, the xylene would
6 also be captured and treated with that system,
7 would they not?

8 A. To the extent that they are leached out
9 of the soil by the rainfall or whatever
10 mechanism, yes.

11 Q. Have you performed any studies that
12 would indicate that the xylene would not be
13 leached out of the soils?

14 MR. TENENBAUM: By rain?

15 BY MR. PORT:

16 Q. By rainfall or by other means to flow
17 water through the soils, that water then being
18 captured by the groundwater treatment system.

19 A. No.

20 Q. Let me go back to the toluene that is
21 in the soils right now.

22 Are you aware of whether or not the
23 toluene in the soils right now, putting aside
24 any toluene in the groundwater, poses any

1 imminent and substantial endangerment?

2 MR. TENENBAUM: The issue of the Agency's
3 finding of imminent substantial endangerment is
4 a record issue, isn't it?

5 MR. FORT: There is a liability issue as to
6 toluene.

7 MR. TENENBAUM: I don't follow what you
8 mean. I don't see how -- you have not indicated
9 how it relates to a non-record issue.

10 MR. FORT: Mr. Tenenbaum, I don't have to
11 tell you all of my theories of the case, but it
12 relates to liability. It relates to liability
13 of somebody who had toluene in their
14 wastestream, allegedly.

15 MR. TENENBAUM: Well, that one calls for a
16 legal conclusion as well as an expert opinion.

17 Because it calls for a legal
18 conclusion, I will instruct the witness not to
19 answer it.

20 MR. FORT: A legal conclusion as to what?

21 MR. TENENBAUM: As to what constitutes an
22 imminent substantial endangerment.

23 MR. FORT: Oh. Okay.

24 MR. TENENBAUM: As well as an expert opinion

1 may be involved as well.

2 MR. FORT: Could I have the question read
3 back, please.

4 (The record was read.)

5 MR. TENENBAUM: Also object on the ground it
6 seeks record-issue discovery. I instructed him
7 not to answer that question.

8 BY MR. FORT:

9 Q. Mr. Boice, could you answer that
10 question if your counsel had not instructed you
11 not to answer it?

12 A. Not right here. I would have to refer
13 to documents.

14 Q. Okay.

15 What documents would you refer to?

16 A. The remedial investigation and the
17 feasibility study.

18 Q. Okay.

19 Any other documents that you would want
20 to refer to?

21 MR. TENENBAUM: Same objection.

22 A. We might also refer to the addendum to
23 the feasibility study.

24

1 BY MR. FORT:

2 Q. When you say addendum to feasibility
3 study, you are referring to the addendum to
4 public comment feasibility study dated March 7,
5 1989?

6 A. Yes.

7 Q. And there is an addendum for Midco I
8 and an addendum for Midco II?

9 A. Yes.

10 Q. Okay.

11 Are there any other documents that you
12 would want to refer to, to answer that question?

13 A. Not that I can think of. No.

14 Q. Okay.

15 Mr. Poice, what evidence is there that
16 toluene is associated with any need to solidify
17 soils to abate any imminent and substantial
18 endangerment.

19 MR. TENENBAUM: That's the same question,
20 isn't it?

21 It calls for a legal conclusion and
22 asks for expert testimony. Instruct him not to
23 answer.

24 MR. FORT: You are going to instruct him not

1 to answer because it seeks a legal conclusion or
2 expert testimony?

3 MR. TENENBAUM: I think so. Unless you can
4 explain to me why I am wrong.

5 MR. FORT: Well, I mean you can object, make
6 your record. But if he can answer it, he can
7 answer it.

8 MR. TENENBAUM: I don't think it is proper
9 to ask this witness, he is not a lawyer, to make
10 legal conclusions.

11 MR. FORT: I find it interesting that
12 whether or not there is an endangerment decision
13 is going to be made by a lawyer and not by a
14 scientist.

15 I don't think it is a legal conclusion
16 at all. And to the extent it represents expert
17 opinion, to the extent there is any expert
18 opinion, we still have to know what foundation
19 information exists for that.

20 MR. TENENBAUM: As I indicated earlier,
21 which substance are we on now?

22 MR. FORT: Toluene.

23 MR. TENENBAUM: Toluene.

24 I indicated earlier if the witness

1 wants to testify about whatever foundation facts
2 he may know relating to that, that would be
3 perfectly fine. But, asking him the ultimate
4 conclusion question that would require an expert
5 opinion or a legal conclusion is not
6 appropriate.

7 But, I will let him answer foundation
8 facts. You have toluene. He may I have already
9 answered it.

10 Go ahead.

11 A. What was the question again?

12 BY MR. FORT:

13 Q. What evidence is there that toluene is
14 associated with any need to solidify soils to
15 abate any imminent and substantial endangerment?

16 MR. TENENBAUM: Same objection.

17 And as I indicated, I am instructing
18 you not to answer this question unless you have
19 any facts that you to the best of your ability
20 think might somehow be relevant to an expert
21 opinion in answer to that question.

22 Now, if you can do that, I will let you
23 do that. If the questioner can rephrase the
24 question so as to elicit a non-objectionable

1 A. I know we have records on US Scrap and
2 US Drum, but I don't know what time period they
3 are for.

4 Q. You know you have them, but you don't
5 know where they are?

6 A. No.

7 I said I don't know what the time
8 period for those records are.

9 Q. how would I obtain access to them, who
10 would I ask?

11 A. Other than a Freedom of Information Act
12 request you mean?

13 Q. Yes.

14 A. Well, that is a formal way, is to send
15 in a Freedom of Information Act request.

16 Q. Or request to produce?

17 A. I guess if it has relevance to this
18 case.

19 Q. Okay.

20 A. I guess you would contact Mike Berman.

21 Q. Do you have any knowledge of the
22 condition of the soil at the Midco sites I and
23 II before Dehart started his operations?

24 A. Based on the documents I have read you

1 mean?

2 Q. Yes.

3 A. I have some knowledge. Yes.

4 Q. What is that?

5 A. That knowledge would be contained in
6 the remedial investigation and feasibility study
7 and there's also some information in the
8 depositions, especially the Robinson deposition
9 regarding disposal at Midco II.

10 And we also have aerial photos of Midco
11 I and Midco II which might provide some
12 information.

13 MR. LUSTGARTEN: No further questions.

14 DIRECT EXAMINATION

15 BY MR. LEAHY:

16 Q. Mr. Boice, my name is Ed Leahy and I
17 represent Scholle Corporation who is a
18 third-party defendant here.

19 Do you have any facts or are you aware
20 of anyone in EPA that has facts indicating that
21 waste from Scholle Corporation was disposed of
22 at Midco I or Midco II?

23 A. Yes.

24 Q. Is that based on personal observations?

1 A. You mean was I on the site on observed
2 wastes coming into the site from Scholle
3 Corporation?

4 Q. Yes.

5 MR. TENENBAUM: Let me incorporate at this
6 point my similar objections that I made to the
7 liability-type questioning by the other
8 defendants, or the defendants, whatever.

9 MR. LPAHY: Okay.

10 A. No. I have never -- I wasn't on the
11 site during the Midco operations and I didn't
12 see any. So I didn't directly observe any
13 wastes from Scholle coming into the site.

14 Q. What is the basis for your information
15 regarding wastes brought into the sites by
16 Scholle?

17 A. It is based on documents available to
18 USEPA.

19 Q. What are those documents?

20 A. There is the Dehart and Intec
21 documents, which I have previously described.
22 Responses to 104 E information request.
23 Possibly information in depositions and
24 transcripts.

1 Q. Is that the only information you have?

2 A. Possibly permits and permit
3 applications.

4 Q. Are you aware of any permit or permit
5 applications for Scholle Corporation?

6 A. I'm not aware of any.

7 Q. If I can ask you if you can look into
8 your documents and if you find any applications
9 or permits regarding Scholle, if you can give me
10 a copy of those I would appreciate that.

11 MR. TENENBAUM: Will you give us a copy of
12 any you have?

13 MR. LEAHY: I would think so, if you
14 request it. Yes. If you have in your
15 discovery, I am sure we would.

16 Q. Do you have any information as to the
17 nature of the wastes brought on to the site by
18 Scholle Corporation?

19 A. You mean off the top of my head?

20 Q. Off the top of your head first.

21 A. No.

22 Q. Other than off the top of your head,
23 would you have any knowledge as to the nature of
24 the wastes brought in there by Scholle

1 Corporation?

2 A. I would have to review the documents.

3 Q. I have a couple more.

4 In response to questioning by Mr.
5 Lustgarten, you said that you know that there
6 was waste from third-party defendants brought on
7 to the site. Strike that question.

8 One last question.

9 In response to Mr. Lustgarten's
10 questions, you indicated that you have all the
11 original records of the Dehart and Intec
12 documents, copies are here but that you have the
13 originals.

14 Do you know if --

15 MR. LUSTGARTEN: I think he only said
16 Dehart. He doesn't have the original Intec
17 records.

18 A. I didn't say I didn't have, but you
19 only asked about Dehart.

20 MR. LUSTGARTEN: Right.

21 MR. TENENBAUM: We don't have originals of
22 those.

23 MR. LEAHY: The Dehart documents.

24 You have all the originals of the

1 Dehart documents and the copies are here.

2 O. Are the copies here, copies of all the
3 original Dehart documents, or are there any
4 original Dehart documents that aren't copied?

5 A. First of all, you said all the Dehart
6 documents. And I'm not sure we even have -- I
7 am sure we don't have all the Dehart documents
8 that were at one time generated. But, we have
9 the ones we have is about all I could say.

10 As far as I know we have photocopies of
11 all Dehart documents that we have.

12 MR. LEAHY: Okay, that's all I have. Thank
13 you.

14 MR. TENENBAUM: Again for the record, as
15 counsel, I am not sure that we have all the
16 photocopies here of all the Dehart documents.
17 We might, but I'm not sure.

18 Well, then, that completes the direct
19 questioning of all except for the agreement that
20 we reached with a couple counsel.

21 We will await to conclude the
22 deposition until counsel for American Can has
23 completed his questioning and I am uncertain at
24 this point whether counsel for Dasoto's

1 questioning is going to be part of this
2 questioning or the 30 (b) 6 depositions that are
3 commencing on Wednesday.

4 MR. FORT: I believe that our 30 (b) 6 that
5 started this included questions that I have not
6 been able to complete questioning on, even given
7 the government's position on the scope of
8 review. But --

9 MR. TENENBAUM: I am just saying when you
10 question next week, you may go into the other
11 transcript.

12 MR. FORT: That's right. And it may not
13 need to be here, I understand that.

14 MR. TENENBAUM: So we will indicate next
15 week that signature will not be waived.

16
17
18
19
20 (Whereupon the deposition was
21 continued sine die.)
22
23
24

1 response, that would be helpful, too.

2 A. Well, as to whether toluene above
3 cleanup action levels in the soils, I would have
4 to refer to the documents in the record.

5 BY MR. PORT:

6 Q. Okay.

7 What do cleanup action levels have to
8 do with whether there is an imminent and
9 substantial endangerment?

10 MR. TENENBAUM: Same objection.

11 I am going to have to object to that
12 one, it also seeks record discovery into a
13 record issue.

14 MR. PORT: He just answered the question, I
15 am just trying to understand his answer.

16 MR. TENENBAUM: The first question was
17 objectionable. The next question is a
18 core-record question. So I can't allow him to
19 answer that.

20 BY MR. PORT:

21 Q. Mr. Boice, you are not answering that
22 question based upon the advice of your counsel?

23 A. Correct.

24 Q. You could answer that question if he

1 had not so instructed?

2 A. Yes.

3 Q. I asked you a couple questions about
4 xylene and to the extent that it was associated
5 with any need for remedial action on the soil
6 material.

7 I believe you said that the situation
8 with xylene would be the same as for toluene?

9 A. Very similar as far as I know.

10 Q. And that is why do you think it would
11 be a similar answer?

12 A. They are both volatile organic
13 compounds. They both have -- they are fairly
14 volatile, have a fairly high vapor pressure.
15 They are organic compounds.

16 Q. What evidence is there that methyl
17 ethyl ketone is associated with any need
18 identified by the Agency to solidify soil
19 material?

20 MR. TENENBAUM: Again the same objections,
21 and I will instruct the witness not to answer
22 unless he can provide foundation fact
23 information about methyl -- what was it --
24 methyl ethyl ketone did you say?

1 MR. FORT: Yes.

2 A. All I can say is the same thing, I
3 would have to look and see whether methyl ethyl
4 ketone is involved above cleanup action levels.

5 Q. If something is above cleanup action
6 levels then it must be solidified in order to be
7 addressed, or are there other technologies that
8 would also remediate that material if it were in
9 the soils?

10 MR. TENENBAUM: Same objection and also
11 vague.

12 A. I think I stated before that the
13 toluene and xylene, for example, in the Midco
14 remedy would we hope primarily -- as well as
15 methyl ethyl ketone -- would primarily be
16 addressed by the soil vapor extraction step.

17 Q. Is that true at both Midco I and Midco
18 II?

19 A. At Midco II we are not requiring the
20 soil vapor extraction step unless it is required
21 to meet land ban requirements or protect the
22 groundwater.

23 Q. So the situation with methyl ethyl
24 ketone, then, is that methyl ethyl ketone will

1 be addressed by a groundwater pumping and
2 treatment system, even to the extent that it is
3 in the soils, because it can be washed out of
4 the soils into the groundwater, correct?

5 A. I think I said soil vapor extraction,
6 not soil flushing.

7 Q. Is your testimony that soil flushing
8 would not work on methyl ethyl ketone?

9 MR. TENENBAUM: Same objection.

10 A. I don't think I ever testified to that
11 effect, no.

12 BY MR. FORT:

13 Q. Okay.

14 In fact, soil flushing could be a means
15 of removing xylene from soil at the Midco site,
16 could it not?

17 MR. TENENBAUM: Same objection, vague, as
18 well as the previous objection.

19 A. I guess you are asking a hypothetical
20 question. If the only contaminants were xylene,
21 toluene and methyl ethyl ketone?

22 Q. That's right.

23 A. We would have to see the actual design
24 of the system, but I can't say right here that

1 it couldn't work.

2 Q. So if you just had toluene, xylene and
3 methyl ethyl ketone, depending upon the design,
4 you believe that a groundwater flushing system
5 could work to remove those substances from the
6 soil to meet acceptable levels?

7 MR. TENENBAUM: Objection, vague.

8 A. It would depend on the design, but we
9 would have to evaluate all the information. Of
10 course, this is a hypothetical situation.
11 Actually it is mixed in with a lot of other
12 chemicals.

13 BY MR. FORT:

14 Q. Okay.

15 What do you mean by soil flushing, what
16 does that mean to an engineer?

17 MR. TENENBAUM: Those was your words.

18 MR. FORT: Those were his words.

19 He introduced soil flushing and I
20 picked up on it. I want to make sure of what
21 his understanding of soil flushing is in case it
22 is different than mine or anybody else's.

23 MR. TENENBAUM: Same objection.

24 A. Soil flushing includes some type of

1 system where water or possibly water mixed with
2 detergents or some other chemicals are -- is
3 taken and the soil is flushed with this water to
4 remove contaminants; could be either in situ or
5 the soil could be excavated and treated.

6 BY MR. FORT:

7 Q. So how does soil flushing differ from a
8 groundwater pump and treat remedy?

9 A. In soil flushing you are actively
10 promoting removal of chemicals from the soil
11 using -- by, for example, recirculating the
12 groundwater and distributing it over the site,
13 so it will pass through all the wastes on the
14 site. Remove contaminants from the site in some
15 type of efficient manner.

16 Rather than just in pumping and
17 treating, there is no recirculation of water, no
18 running of water through the soil, except for
19 what possibly may run through the soil as a
20 result of natural precipitation.

21 Q. To make sure I understand what you are
22 saying, a groundwater pumping and extraction and
23 treatment system could become a flushing system,
24 if the groundwater or some other water, for

1 example, or other material, but in my
2 hypothetical water, were then put back into the
3 site in order to promote removal of material
4 from the soils?

5 A. That is a possible scenario.

6 Q. And that type of a treatment mechanism
7 would work for a site that had toluene, xylene
8 and MER, correct?

9 MR. TENENBAUM: Asked and answered twice
10 before.

11 A. As I stated before, it is possible
12 depending on the site conditions.

13 MR. TENENBAUM: Also hypothetical. This is
14 all hypothetical. I object on that ground as
15 well.

16 BY MR. FORT:

17 Q. Are you familiar with the substance
18 known as methyl isobutyl ketone?

19 A. Yes.

20 Q. Was that substance also found at the
21 site?

22 A. Yes.

23 Q. Assuming that that material were also
24 found in wastes sent to the site from a Desoto

1 facility, what evidence is there that this
2 material, methyl isobutyl ketone, is associated
3 with any need identified by the Agency to
4 solidify that soil material?

5 MR. TENENBAUM: Same objection and
6 instructions as earlier. Please confine your
7 answer to foundation facts relating to methyl
8 isobutyl ketone.

9 A. I would have to go back to the
10 documents to determine whether that compound
11 exceeds the cleanup action levels for soils.

12 BY MR. FORT:

13 Q. If it exceeded the cleanup action level
14 for soils, would that mean that solidification
15 would be the only way that you could remove that
16 material from the soils, so as to meet cleanup
17 action levels?

18 A. My answer --

19 MR. TENENBAUM: Same continuing objection.

20 A. -- is the same as for the previous
21 chemicals.

22 BY MR. FORT:

23 Q. So this material, methyl isobutyl
24 ketone, would have the same characteristics as

1 the three that we have already talked about,
2 xylene, toluene and MFR, correct?

3 A. It would be similar to MER.

4 Q. And with respect to this groundwater
5 extraction technique with or without flushing,
6 that would be a means of removing this material,
7 the MIR, if you will, from the soils?

8 MR. TENENBAUM: Same continuing objection.

9 I don't know why you built into your
10 question to end with assumptions that are not
11 the same as the previous answers. Object to
12 that process.

13 A. I think there is some potential if the
14 process was properly designed for soil flushing
15 under -- if the site conditions were proper.
16 But, I don't know that that is true at Midco.
17 And I don't think it would be effective, if
18 there was no flushing.

19 BY MR. PORT:

20 Q. You think that flushing would be
21 necessary in order for that to be effective on
22 MIR?

23 MR. TENENBAUM: Object.

24 A. That would be my best judgment.

1 Q. But you would believe that you would
2 have to look at that obviously more closely than
3 you have as of today sitting here answering my
4 questions?

5 A. Yes. And it is also hypothetical. It
6 is assuming only those chemicals are present on
7 the site.

8 Q. What about with respect to acetone,
9 would your answers with respect to acetone be
10 the same as they have already have been with
11 respect to toluene and xylene?

12 A. Yes. Except acetone probably is less
13 capable of being removed by soil vapor
14 extraction.

15 Q. Less capable of being removed by soil
16 vapor extraction?

17 A. Yes.

18 Q. But it could be removed by the either
19 the groundwater extraction system or by the
20 groundwater flushing system?

21 A. Yes, it would have potential, but
22 mainly by the flushing system.

23 MR. TENENBAUM: Same continuing objections.
24

1 BY MR. FORT:

2 Q. What about a material called ethyl
3 acetate, are you familiar with that material?

4 A. I am not very familiar with that
5 material.

6 Q. Do you know whether or not that
7 material would be amenable to the same
8 groundwater extraction system as toluene would
9 be for that kind of a system?

10 A. Probably.

11 Q. What about a material known as
12 tetrachloroethylene?

13 T-e-t-r-a-c-h-l-o-r-o-e-t-h-y-l-e-n-e.

14 Are you familiar with that substance?

15 A. Yes.

16 Q. Would your answer with respect to that
17 substance be any different than it already has
18 been with respect to toluene and xylene?

19 A. No.

20 Q. So tetrachloroethylene would also be
21 amenable to a groundwater treatment and
22 extraction technique, would it not?

23 A. Possibly.

24 Q. And that answer applies to that

1 material whether it would be in the groundwater
2 or in the soils?

3 MR. TENENBAUM: Same continuing objections.

4 A. Yes.

5 BY MR. FORT:

6 Q. Mr. Boice, where would I go if I had
7 information that other substances were in the
8 wastestream of my client?

9 Where would I go to find out whether or
10 not those substances had been found by EPA in
11 the course of the remedial investigation
12 feasibility study at the Midco I or the Midco II
13 sites?

14 A. The most complete listing of the
15 analytical results in the remedial investigation
16 is in Appendix A to the remedial investigation.

17 Q. Is there any other place that one would
18 look beside Appendix A to the remedial
19 investigation?

20 MR. TENENBAUM: One would look for?

21 I want to make it very clear what your
22 question is.

23 MR. FORT: Whether or not a particular
24 chemical substance was found at the site.

1 MR. TENENBAUM: That is very different.

2 MR. FORT: That's the first question.

3 MR. TENENBAUM: Your first question was
4 where in the remedial investigation feasibility
5 study one would look for that.

6 MR. FORT: No.

7 A. You said the RI/FS before.

8 MR. TENENBAUM: You did.

9 BY MR. FORT:

10 Q. Let's go back at it, we will come at it
11 again.

12 If I wanted to locate the Agency
13 information concerning what chemical substances
14 were found at the site, where would I go to
15 look, what document should I consult?

16 A. This is for Midco I or Midco II?

17 Q. Let's do Midco I first.

18 A. Okay.

19 First the remedial investigation
20 feasibility study. Then there were some
21 preliminary reports by EPA, which is the
22 hydrogeological study by R&E. That is not
23 nearly as complete as the RI/FS

24 And there also might be some

1 information for the removal action, some
2 analytical data, that was collected during the
3 removal action, and analytical data prepared for
4 each of the removal actions.

5 Q. Okay.

6 Is there any analytical information or
7 were there any substances sampled for in these
8 preliminary reports, whether the hydrogeologic
9 reports by P&E, or the other early sampling that
10 was done, that would not be found in the
11 remedial investigation feasibility study?

12 A. I don't know.

13 Q. Okay.

14 Isn't the remedial investigation
15 feasibility study supposed to be a compendium
16 and compilation of all relevant data for the
17 sites?

18 MR. TENENBAUM: All relevant sampling data?

19 MR. PORT: Thank you. Sampling data, yes.

20 A. Well, it is supposed to be an
21 evaluation of the site conditions at that time,
22 and that means that some contaminants, for
23 instance, during the removal action, some
24 contaminants may have been removed from the

1 site. And, therefore, they weren't detected
2 during the RI/FS.

3 Q. Okay.

4 So if it is not in the RI/FS, you would
5 suggest that that means that if the substance
6 had been there, it had been removed or it wasn't
7 there in the first place?

8 MR. TENENBAUM: Objection, seeks expert
9 opinion.

10 A. Well, you can't make a blanket
11 statement like that.

12 But, the RI/FS is the best evaluation
13 we have of site conditions at the time of the
14 sampling. And if it wasn't detected in the
15 RI/FS, but it was during the removal action, it
16 is still possibly that there could be pockets of
17 contamination that we didn't detect during the
18 RI/FS.

19 The RI/FS is supposed to be sufficient
20 for evaluating risks from the site and
21 evaluating remedial alternatives and not for
22 detecting all compounds that possibly could be
23 on the site.

24

1 BY MR. FORT:

2 Q. Let me make sure I understand what you
3 just said.

4 The RI/FS is intended to be able to
5 characterize the risks on the site, not to
6 sample for each and every type of substance that
7 is at the site?

8 A. That's right.

9 It is not designed to sample or
10 characterize everything in the site. Just
11 enough so we can evaluate, get a good idea of
12 the risk and justify a remedial action. Then
13 evaluate remedial alternatives.

14 Q. Does that mean that things that are not
15 even sampled for as part of the RI/FS have been
16 judged by the Agency to be of not as significant
17 a threat as the things that are sampled for?

18 MR. TENENBAUM: The Agency didn't do the
19 RI/FS.

20 MR. FORT: The Agency specified what was to
21 be done in the RI/FS.

22 I can't believe they wouldn't have a
23 thorough investigation.

24 A. I don't think I ever said it wasn't a

1 thorough investigation. I think it was very
2 thorough.

3 But, I don't think we could make just a
4 blanket statement that if it wasn't detected in
5 the RI/PS, that it is absolutely for sure not on
6 the site.

7 BY MR. FORT:

8 Q. I understand that.

9 I am going further as to the rationale
10 used by the Agency in selecting what parameters
11 should be sampled for at the site.

12 A. So what is the question?

13 Q. Well, you have indicated that an RI/PS
14 does not sample for every chemical substance
15 known to man, correct?

16 A. Yes.

17 Q. Do you know the reason why the Agency
18 sampling for certain things or requires others
19 to sample for certain things but not for
20 everything?

21 A. Well, basically it is a trade-off.
22 They evaluate, there is the -- a list of
23 compounds that are very commonly generated
24 during industrial operations and are common

1 industrial pollutants. And there are other
2 compounds that are not very common or reactive
3 or something like that. They react so fast that
4 they are not likely to be detected in the
5 environment.

6 And so the Agency just runs the screen
7 for all the most common, the common industrial
8 pollutants that may be present on the site.

9 Q. But the purpose of the sampling is to
10 be sure that the risks presented by the site are
11 adequately characterized, are they not?

12 A. That's correct.

13 (Whereupon a short recess was had.)

14 Q. Okay. We are back on the record.

15 Mr. Boice, if the evidence were that
16 the hazardous substances found at the site that
17 were in the waste materials that Desoto produced
18 at their plant were toluene, xylene, MEX, MIX,
19 acetone, tetrachloroethylene, and ethyl acetate,
20 the same substances that we were talking about;
21 what information do you have that would indicate
22 that Desoto would be in bad faith under the
23 unilateral administrative orders?

24 MR. TENENBAUM: Objection.

1 I don't even understand the question,
2 but it sounds like it is hypothetical as well as
3 the other objections I voiced earlier. Go
4 ahead.

5 A. I don't know what you mean by in bad
6 faith.

7 BY MR. FORT:

8 Q. If Desoto's waste materials contained
9 toluene, xylene, MMR, MIK, acetone,
10 tetrachloroethylene and ethyl acetate, and those
11 materials, as we have already discussed, would
12 be amenable to treatment via a groundwater
13 extraction or flushing technique; do you have
14 any information as to whether or not Desoto
15 would be acting in good faith in reserving the
16 issue for trial on whether or not solidification
17 was an appropriate remedy?

18 MR. TENENBAUM: Objection, hypothetical and
19 the other objections I have stated.

20 A. I think that's a legal determination.
21 I am not an attorney, I really can't answer that
22 question.

23 BY MR. FORT:

24 Q. Do you have any facts, are you aware of

1 any facts that would go to the good faith or
2 reasonableness of Desoto wanting a trial as to
3 whether or not it was responsible for
4 solidification as a necessary remedy?

5 MR. TENENBAUM: Object, vague and ambiguous.
6 Calls for a legal conclusion, and my other
7 previous objections.

8 A. Can you clarify that question?

9 BY MR. PORT:

10 Q. What don't you understand about the
11 question?

12 A. I would have to have it reread.

13 Q. Would the court reporter read it back,
14 please.

15 (The question was read.)

16 A. You mean do we have any facts related
17 to whether or not Desoto is in good faith
18 regarding the unilateral administrative order?

19 Q. We can start with that. Yes.

20 A. Our facts regarding the matter are
21 contained in the unilateral order,
22 administrative record.

23 Q. Are the only facts that you have
24 concerning this issue of good faith contained in

1 the unilateral administrative order?

2 MR. TENENBAUM: Objection.

3 Desoto has not yet provided to us the
4 basis for its alleged defenses, in compliance
5 with the order. It is scheduled to do so on
6 August 13.

7 You are asking the witness to testify
8 about information that -- you are asking for
9 testimony about matters, information that has
10 not been provided to the government at this
11 time.

12 MR. FORT: I am asking him what evidence he
13 has as to the issue of Desoto's good faith.

14 MR. TENENBAUM: That is asking the witness
15 to prove a negative. You have not told us what
16 sufficient cause Desoto intends to allege for
17 not complying with the orders.

18 When you do so, we will have an
19 opportunity to take discovery into that and so
20 on.

21 MR. FORT: So this witness has no factual
22 information at this point concerning whether or
23 not Desoto is acting in good faith with respect
24 to the unilateral administrative orders?

1 MR. TENENBAUM: Well, as to the grounds for
2 which Desoto is contending it is acting in good
3 faith, at least as they pertain to the line of
4 questioning you have been addressing thus far,
5 Desoto has not provided any information to the
6 government on that as to what it is contending.

7 Therefore, how can he answer the
8 question? We don't know what your contention is
9 as to why you are in good faith in this
10 connection.

11 BY MR. FORT:

12 Q. You may answer the question.

13 MR. TENENBAUM: It is impossible for him to
14 answer the question. It is an impossible answer
15 to it. You haven't told him what the sufficient
16 cause is.

17 MR. FORT: Mr. Tenenbaum, you can ask him
18 another question if you want to rehabilitate the
19 witness or clarify something.

20 I asked him if he has any information
21 right now. If he doesn't have any information,
22 that's fine.

23 A. Any information on what?

24 Q. Can you read back the question, if you

1 can find it.

2 (The question was read as follows:

3 "Q. Are the
4 only facts that you have
5 concerning this issue of
6 good faith contained in the
7 unilateral administrative
8 order?)"

9 MR. TENENBAUM: Objection. This witness has
10 not been designated to testify on that subject.
11 Are you proceeding under the Standard T notice
12 for this question? If not, I will have to
13 instruct him not to answer.

14 BY MR. FORT:

15 Q. Mr. Boice, could you answer the
16 question if Mr. Tenenbaum had not instructed you
17 not to answer it?

18 A. Not fully. No.

19 Q. Why couldn't you answer it fully? It
20 is a yes-no question.

21 MR. TENENBAUM: Don't answer the question.

22 A. Will you repeat the question?

23 MR. FORT: I will go on.

24 Q. Mr. Boice, at this point in time do you

1 have any information concerning whether or not
2 Desoto has acted in good faith with respect to
3 the unilateral administrative orders.

4 MR. TENENBAUM: Overbroad, vague, ambiguous,
5 calls for a legal conclusion.

6 A. I can't answer that question.

7 BY MR. FORT:

8 Q. Okay.

9 Mr. Boice, do you have any information
10 as to the reasonableness of Desoto's conduct
11 with respect to the unilateral administrative
12 orders?

13 MR. TENENBAUM: Same objection.

14 A. Yes. We have some information.

15 BY MR. FORT:

16 Q. What information is that?

17 A. We have got the information in the
18 administrative record for the unilateral
19 administrative order.

20 We have the letters that were sent by
21 the respondents to the Agency regarding whether
22 they would comply with the unilateral
23 administrative orders.

24 We have material from the court motions

1 and court proceeding.

2 Q. Anything else?

3 A. That is all I can think of right now.

4 Q. When you say administrative record, are
5 you talking about the certified record in this
6 case or is there some other administrative
7 record you are referring to?

8 A. I am referring to the certified record.

9 Q. Does your reference here include the
10 so-called liability information that the Agency
11 has assembled?

12 A. It would include that, yes.

13 Q. As to this information that you have
14 just cited concerning the reasonableness of
15 Desoto's conduct, what information shows that
16 Desoto's conduct with respect to the unilateral
17 administrative orders has been unreasonable?

18 MR. TENENBAUM: Objection.

19 Desoto has still not told us why they
20 believe it was reasonable. How can he tell you
21 why he disagrees with Desoto's reasons, when
22 Desoto hasn't told us its reasons yet?

23 BY MR. FORT:

24 Q. You may answer the question.

1 MR. TRNENBAUM: How can he tell you what
2 facts negate your reasons when you haven't told
3 us the reasons?

4 A. I can't answer that question.

5 BY MR. FORT:

6 Q. Well, Mr. Boice, how are you able to
7 tell me what things, what documents went to
8 Desoto's reasonableness, but you can't tell me
9 what things in fact go to that, the question of
10 reasonableness?

11 A. You asked me about whether we had any
12 facts regarding reasonableness, and I told you
13 that the facts would be obtained or at least
14 partially obtained -- contained in these
15 documents, and includes letters from the
16 respondents indicating they would not comply
17 with the unilateral administrative orders.

18 Q. I believe those documents will state
19 what they state, Mr. Boice. But, let's not
20 belabor that point.

21 Is there anything else other than the
22 letters that you believe go to the question of
23 reasonableness of Desoto's position with respect
24 to the unilateral administrative orders?

1 MR. TENENBAUM: Other than the letters and
2 the other things he already said?

3 MR. FORT: He just said the letters.

4 Q. Have we got something else besides
5 letters?

6 A. I said the letters, the court hearings,
7 the motions, the unilateral administrative order
8 index.

9 Q. What is the unilateral order
10 administrative index?

11 A. Unilateral administrative order, I
12 mean.

13 Q. Does the potential evidence that
14 Desoto's wastes contain materials that were all
15 amenable to a groundwater treatment approach not
16 go to the question of reasonableness?

17 MR. TENENBAUM: Objection.

18 A. I don't think it has been established
19 that those are the only hazardous substances in
20 your wastes.

21 BY MR. FORT:

22 Q. Well, if those were the only hazardous
23 substances in our wastes that were still found
24 at the site, would that go to the question of

1 reasonableness?

2 MR. TENENBAUM: Objection, hypothetical.
3 Calls for a legal conclusion.

4 And I think on that one, it is a pure
5 legal conclusion you are asking him. I will
6 have to direct him not to answer.

7 MR. FORT: Counsel, you can't direct him not
8 to answer a legal conclusion question. You can
9 object.

10 I think you are stretching credibility
11 to object on legal conclusion, after this
12 witness -- excuse me -- after there witness has
13 already answered the same question.

14 MR. TENENBAUM: No.

15 A. I never answered that question.

16 MR. TENENBAUM: I objected to all those
17 questions and he never answered it in the
18 fashion that you said.

19 And if you are asking him for the
20 Agency's legal position on what would constitute
21 or what the standard is or the test is or the
22 evidence is on the sufficient cause for Desoto's
23 non-compliance with the orders.

24 MR. FORT: Mr. Tenenbaum, I have never said

1 the word sufficient cause yet.

2 I have asked him for whether or not
3 specific facts went to the question of
4 reasonableness.

5 He has already identified things that
6 he believes goes to the question of
7 reasonableness. As soon as I identified
8 something that we may assert goes to the
9 opposite, you know, Mr. Tenenbaum, let's let the
10 facts come out and not try to stop the
11 questioning here.

12 MR. TENENBAUM: He is just picking things
13 out that might be relevant.

14 Once you tell us what your reasons
15 are -- he is not going to be the witness, he is
16 not going to be presenting legal positions on
17 what is reasonable.

18 MR. PORT: Mr. Tenenbaum, this witness --

19 MR. TENENBAUM: So it is --

20 MR. PORT: May I talk? May I speak?

21 MR. TENENBAUM: You may speak.

22 MR. KEATING: I don't know how the court
23 reporter is getting all this down.

24 MR. PORT: I am going to ask the court

1 reporter if he can per chance find the straight
2 forward question that engendered this exchange.

3 MR. TENENBAUM: I have already instructed
4 him not to answer that question.

5 MR. PORT: Could you read it back? Because,
6 I have got a couple of questions for the
7 witness.

8 (The record was read as follows:

9 "O. Well, if those
10 were the only hazardous
11 substances in our wastes
12 that were still found at the
13 site, would that go to the
14 question of
15 reasonableness?")

16 MR. TENENBAUM: Again I instruct the witness
17 not to answer that question on the grounds I
18 have indicated.

19 And I further point out that we have
20 noticed Desoto's 30 (b) 6 deposition as to the
21 reasons that it contends it is entitled not to
22 comply with the orders. And Desoto refused to
23 produce any witness.

24 When Desoto is the one who decided not

1 to comply with the orders, then refused to
2 produce a witness to testify on that for us --
3 and we will deal with that at a later date -- I
4 am not going to have my witness testify in the
5 abstract dark about our basis of negating those
6 reasons when you haven't produced a witness for
7 us.

8 MR. FORT: Are you saying, Mr. Tenenbaum,
9 that you would reproduce this witness if Desoto
10 produced a witness?

11 MR. TENENBAUM: No, I am not saying that.

12 MR. FORT: Then I would like this witness to
13 answer my question.

14 MR. TENENBAUM: The reason I am not saying
15 that, it is possible that if this witness is the
16 one who has factual knowledge on some of the
17 issues raised, I can't tell in the abstract
18 until I hear what your witness is going to say,
19 whether this witness would have any knowledge on
20 the facts relating to that.

21 The answer to your question is I don't
22 know.

23 MR. FORT: We don't go into this
24 priority-type of discovery. If this witness has

1 any information, I am entitled to it.

2 I would also point out that you have
3 allowed every other counsel to ask questions as
4 to bad faith issues and reasonableness of
5 conduct, and I don't understand why you are
6 stopping me from conducting very legitimate
7 inquiry that you have already allowed us to
8 again, particularly --

9 MR. TENENBAUM: It was not --

10 MR. FORT: Excuse me.

11 -- particularly with a direction not to
12 answer. An objection I understand, but
13 direction not to answer I think is improper.

14 MR. TENENBAUM: Sorry.

15 It was improper, first of all, you are
16 asking the general in the abstract, rather than
17 pointing to a specific cause that you contend
18 you have. That is one thing that is improper.
19 The second thing that is improper is you didn't
20 even produce a witness for us on this.

21 MR. FORT: Mr. Tenenbaum, this witness is
22 under oath. He is here. If he has any
23 information, he can answer the question.

24 We have spent an awful lot of time with

1 your argument here on a straightforward
2 question. I am going to ask the court reporter
3 once again to read it, so that we can make our
4 record here Mr. Tenenbaum.

5 I would ask you to restrain yourself so
6 that we can proceed.

7 (The question was reread as follows:

8 "O. Well, if those
9 were the only hazardous
10 substances in our wastes
11 that were still found at the
12 site, would that go to the
13 question of
14 reasonableness?"

15 MR. TENENBAUM: Same instruction.
16 Objection.

17 MR. FORT: You are instructing him not to
18 answer?

19 MR. TENENBAUM: Yes.

20 BY MR. FORT:

21 O. Mr. Boice, could you answer that
22 question if your counsel had not directed you
23 not to answer?

24 A. No. I don't think that is a factual

1 question. It has to do with a legal procedure.

2 Q. Is it your testimony that from a
3 technical standpoint, if someone has substances
4 in their waste that have nothing to do with the
5 need for a remedy, that that is a legal issue
6 and not a technical issue?

7 A. You misstated the testimony.

8 Q. I am just asking if you would clarify.
9 I am trying to understand.

10 MR. TENENBAUM: Can you read back that
11 question.

12 (The record was read.)

13 Object to the form.

14 A. I don't understand the question.

15 BY MR. FORT:

16 Q. Okay.

17 Mr. Boice, in your position as remedial
18 project manager, do you make determinations of
19 who may be responsible for hazardous substances
20 being present at a site?

21 A. I participate in identifying
22 potentially responsible parties.

23 Q. And how do you do that identification
24 process?

1 A. Well, we get any information we can
2 about the site. We send out information
3 requests.

4 We use whatever information we can to
5 evaluate what was sent to the site by a certain
6 company or companies. And if it included
7 hazardous substances, we consider whether they
8 should be considered a potentially responsible
9 party.

10 Q. If there is no evidence of a hazardous
11 substance being sent to the site, is that
12 company then ruled out as being a potential
13 responsible party?

14 A. Yes.

15 Q. Okay.

16 If there is evidence that --

17 A. Unless I guess there could be an
18 exception.

19 I guess contaminants can theoretically
20 cause a problem at certain sites under CERCLA.
21 But, normally it is only the hazardous
22 substances.

23 Q. And, similarly, if the evidence were
24 that a hazardous substance was -- even if it had

1 been sent to the site, if it could be proven
2 that all the hazardous substances were removed
3 from the site or trans-shipped to another
4 location, that person would not be a potential
5 responsible party as well?

6 MR. TENENBAUM: Object. Calls for a legal
7 conclusion and discovery into the Agency's
8 thought processes.

9 BY MR. PORT:

10 Q. You may answer the question.

11 A. I don't know that that is true. I'm
12 not sure.

13 Q. Okay.

14 Mr. Boice, are you a person that
15 participants in any technical evaluation of
16 whether or not actions taken by a potentially
17 responsible party are appropriate or reasonable?

18 MR. TENENBAUM: What actions?

19 What actions are you referring to?
20 Vague and ambiguous.

21 MR. PORT: Can you read it back.

22 (The record was read.)

23 A. In what context?

24 Q. In any context.

1 A. Depends on the context.

2 Q. Okay.

3 In what context would you participate
4 in that kind of an evaluation?

5 A. Well, the normal procedure is once the
6 site is listed on the National Priority List, it
7 is assigned to a certain remedial project
8 manager.

9 The first step on the National Priority
10 List is to conduct a remedial investigation
11 feasibility study. We negotiate, we try to send
12 notice letters to potentially responsible
13 parties as soon as possible in the process, so
14 that we can try to reach an agreement with them
15 to conduct the remedial investigation
16 feasibility study.

17 And in that process, if we come to an
18 agreement, then there is a statement of work in
19 the agreement that outlines what the potentially
20 responsible parties are supposed to do under the
21 agreement.

22 And my job would be to indicate -- in
23 the case of an action against the potentially
24 responsible parties for the RI/FS, in the next

1 phase after the RI/FS, in the selection of a
2 remedy by USEPA during the remedial design and
3 remedial action by the potentially responsible
4 parties -- would be to evaluate whether they are
5 in compliance with the consent order or consent
6 decree; whether they are following the statement
7 of work; whether they are in compliance with the
8 National Contingency Plan; whether they are in
9 compliance with the rules and regulations.

10 And that is everything I can think of
11 right now. I could have missed whatever you
12 meant to ask.

13 Q. So as the remedial project manager, you
14 are involved in evaluating the technical
15 adequacy of actions taken by potentially
16 responsible parties, are you not?

17 A. Yes.

18 Q. And that includes, in the context of
19 the unilateral administrative order, whether or
20 not those actions are consistent with or
21 reasonable under a unilateral administrative
22 order; is that correct?

23 MR. TENENBAUM: You are talking about
24 technical aspect?

1 MR. PORT: Yes.

2 A. Reasonable or what was the other
3 criteria?

4 Q. Compliance with or reasonable.

5 A. Yes. I participate in that evaluation.

6 Q. Okay.

7 Mr. Tenenbaum, since you have indicated
8 that you don't want this witness to answer any
9 questions about Desoto's good faith or
10 reasonableness of its conduct, because we
11 haven't proffered any information yet, and you
12 have pointed out that our response is due in ten
13 days, I would ask the opportunity to continue
14 this line of questioning to a later time, since
15 this person clearly will be involved in an
16 evaluation and determinations by the Agency on
17 the reasonableness questions.

18 MR. TENENBAUM: We will take that under
19 advisement, that request under advisement.

20 As you know, Desoto's response is long
21 overdue and Desoto has agreed to provide it by
22 then. We would have already moved for a motion
23 to compel if Desoto had not agreed to provide it
24 then. The response was long ago due.

1 We will take it under advisement when
2 we see them and when we see what the situation
3 is, but we are not making any promises at this
4 time.

5 MR. FORT: Okay.

6 Q. Before we leave this area, Mr. Boice,
7 are there any guidance memoranda established by
8 the USEPA for remedial project managers or other
9 Agency employees to evaluate the reasonableness
10 of potentially responsible parties' actions in
11 response to unilateral administrative orders?

12 MR. TENENBAUM: Technically.

13 MR. FORT: Technically.

14 A. They are guidance documents on PRP
15 oversight. Oversight of PRP, RI/FS and probably
16 other actions, too, yes.

17 Q. Are you aware of any for unilateral
18 administrative orders?

19 A. Well, some of them would also apply to
20 actions taken under unilateral administrative
21 orders.

22 Q. Would they apply to remedial design,
23 remedial action requirements under unilateral
24 administrative orders?

1 A. Some of them would apply to that also.

2 Q. Do you recall any that would apply?

3 A. Not off the top of my head I can't name
4 them, no.

5 Q. Do you know if those are included in
6 the administrative records here?

7 A. All the documents that we considered or
8 relied upon are in the administrative records.

9 Q. Do you know if the Agency guidance
10 documents concerning unilateral administrative
11 orders and reasonableness of actions taken are
12 included in this certified administrative
13 record?

14 MR. TENENBAUM: Technical reasonableness?

15 A. If I can, if you were designing
16 something and whether or not we should --

17 BY MR. PORT:

18 Q. Right.

19 A. I think the administrative record is
20 for the issuance of the unilateral
21 administrative order, not for evaluation of
22 compliance with the unilateral administrative
23 order. So I am not sure whether they would be
24 or not.

1 Q. You are not sure if these guidance
2 documents that address the issue are in the
3 record or not?

4 A. No, I am not sure.

5 Q. Okay.

6 Mr. Boice, let me shift gears a little
7 bit and go to some of the questions that relate
8 to cost.

9 Mark this whatever the next one is,
10 please.

11 (The document above-referred to
12 was marked Boice Deposition
13 Exhibit No. 55 for identification.)

14 Mr. Boice, let me show you what we have
15 marked as Exhibit No. 55, which is a two-page
16 letter addressed to you.

17 Have you seen that document before?

18 A. Yes.

19 Q. Can you describe Exhibit 55 for us?

20 A. It is a letter to me from some of the
21 Midco trustees or Midco Steering Committee
22 members.

23 Q. What is the topic of that letter?

24 A. It is regarding the Midco II removal

1 being conducted by USEPA.

2 Q. What was that Midco II removal?

3 A. Where we were, the Agency was
4 excavating highly contaminated soils from the
5 sludge pit and filter bed and placing them on
6 the site and then removing them from the site to
7 a disposal area.

8 Q. Who was the contractor that did that
9 work for USEPA?

10 A. I don't know.

11 Q. Do you recall anything about who was
12 doing the work at all?

13 MR. TENENBAUM: Just so the record is clear,
14 Mr. Boice is likely not the designee of the
15 Agency on removal issues.

16 So I want to make it clear here that he
17 is testifying under his personal deposition, not
18 as any designee.

19 MR. PORT: Okay.

20 A. I know the remedial project manager was
21 William Simes.

22 Q. William Simes?

23 A. Yes.

24 Q. You are not sure though by whom he was

1 employed?

2 A. He is USEPA's employee. USEPA's on
3 scene coordinator.

4 Q. Oh.

5 So there was an on scene coordinator as
6 well as a remedial project manager?

7 A. Yes.

8 Q. Okay.

9 Who did Mr. Simes report to as on scene
10 coordinator?

11 A. I believe at that time -- at that time
12 you mean?

13 Q. Right. If you can recall.

14 A. I know Robert Bowden was one of the
15 supervisors.

16 Q. Was Mr. Simes in a different branch
17 than you within the waste management division?

18 A. Yes. He is in the emergency removal
19 branch.

20 Q. The emergency removal branch has a
21 different chain of command than does the
22 remedial project branch?

23 A. Correct, yes.

24 Q. And how far up the reporting structure

1 does it go before they -- there is a common
2 supervisor?

3 A. At that time it would have been the
4 division director.

5 Q. Who is the division director?

6 A. At that time it was Basil Constantelos.

7 Q. Is that the same Mr. Constantelos that
8 signed the unilateral orders?

9 A. Yes.

10 Q. What was your responsibility with
11 respect to this removal action that was being
12 conducted under Mr. Simes' supervision?

13 A. I had basically no responsibility other
14 than keeping track of what was being addressed
15 in the cleanup action.

16 Q. The document that we have marked as
17 Exhibit No. 55 has various statements contained
18 in it, does it not?

19 A. Yes.

20 Q. Do you disagree with any of the
21 statements that are made there concerning the
22 Midco II removal action?

23 MR. TENENBAUM: You will have to go through
24 each. It is compound. You will have to go

1 through each statement.

2 MR. FORT: Do you want to take a break while
3 he does that? Five minutes, maybe.

4 (Whereupon a short recess was had.)

5 We are back on the record.

6 We have had a discussion about schedule
7 and procedures. I have probably two hours left
8 of questions, but all those questions go to cost
9 issues. And since we have days set a site for
10 next week for those issues, and on Wednesday and
11 Thursday and even Friday for continuation and
12 completion of the American Can questions, I
13 would, with consent of counsel, recess my
14 questioning here to allow a few others, who
15 claim to have much more limited questioning left
16 than I do, to proceed.

17 Is that agreeable, Mr. Tenenbaum?

18 MR. TENENBAUM: Yes.

19 MR. FORT: Thank you.
20
21
22
23
24

1 DIRECT EXAMINATION

2 BY MR. LUSTGARTEN:

3 Q. Mr. Boice, I am Ralph Lustgarten. I
4 represent the third-party plaintiffs.

5 I would like to ask you some questions
6 about your knowledge of the third-party
7 defendants and their waste, and where the waste
8 ended up and what, if any, records you have
9 relating to it their waste.

10 Firstly, I recall you indicated that
11 the Midco drivers Mitchell and Robinson were
12 interviewed, correct, do you remember them?

13 A. I don't know whether they were
14 interviewed or not. I know Ron Crouch was
15 interviewed, I think. I haven't looked at all
16 the documents recently.

17 Q. All right.

18 Do you know how many Midco employees
19 were interviewed?

20 A. You mean deposed or interviewed?

21 Q. No, interviewed.

22 A. No, I don't.

23 Q. Do you recall who were interviewed?

24 A. As I stated before, I think it was Ron

1 Crouch was interviewed.

2 Q. That's the only person you know?

3 A. That is all I know about.

4 Q. Who did the interviewing?

5 A. Mike Berman.

6 Q. Did he do all the interviewing for you?

7 A. There was only one -- of this interview
8 that I know of. That was conducted by Mike
9 Berman.

10 Q. Where are the notes of Berman's
11 interview?

12 A. Those were produced during this
13 deposition.

14 Q. Those were typewritten notes. Were
15 there any handwritten notes?

16 A. I don't know.

17 Q. Was there a tape of that interview?

18 A. I don't know.

19 Q. In Berman's typewritten notes of the
20 interview, he referred to a card file for Midco.
21 Do you know where the card file is?

22 A. I think I stated before that I think we
23 have it, but I don't know exactly where it is,
24 meaning the EPA has it.

1 Q. I would like to see it if I could. If
2 somebody would make an effort to locate it for
3 me.

4 MR. TENENBAUM: Well, as we have indicated,
5 these would have already been produced, but we
6 will take a look for it.

7 A. The original card file you mean?

8 MR. LUSTGARTEN:

9 Q. Yes.

10 Were 104 --

11 MR. TENENBAUM: Can we go off the record for
12 a second.

13 (Discussion had off the record.)

14 BY MR. LUSTGARTEN:

15 Q. Were 104 R requests sent to the
16 third-party defendants?

17 A. Yes.

18 Well, I shouldn't say all of them. All
19 of the PRP's that USEPA had identified in 1983
20 were sent 104 R requests.

21 Q. And did they all respond?

22 A. Not all responded. No.

23 Q. Where are the responses located, in the
24 files?

1 A. Yes, not here, but we have some in the
2 office.

3 Q. Those have not been produced, have
4 they?

5 A. I believe those were produced to the
6 defendants in 1985. We produced all the -- I
7 guess I'm not sure about that.

8 I'm not sure whether that has been
9 produced or not.

10 Q. I would like to see those, I haven't
11 seen those.

12 Who would I call about that?

13 MR. TENENBAUM: Call Mike Berman and make
14 whatever arrangements, to the extent there is
15 not privileged or confidential information.

16 MR. LUSTGARTEN: All right.

17 Q. The original records of Midco, do you
18 have them in your possession?

19 MR. TENENBAUM: Which ones?

20 A. You mean the Dehart and Intec
21 documents?

22 BY MR. LUSTGARTEN:

23 Q. No. The Dehart.

24 A. Just the Dehart?

1 Q. Yes.

2 A. The originals?

3 Q. Yes.

4 A. I'm sure USEPA has them. I am not sure
5 where they are.

6 Q. Are they in these records here?

7 A. Photocopies are in those records.

8 Q. Have any of the third-party defendants'
9 employees been interviewed?

10 MR. TENENBAUM: By whom?

11 BY MR. LUSTGARTEN:

12 Q. By USEPA.

13 A. Third-party defendants' employees?

14 Q. Yes, sir.

15 A. Been interviewed, or deposed you mean;
16 just interviewing?

17 Q. Yes.

18 A. Not that I know of.

19 I think I already said the only
20 interview I know of is the Ron Crouch interview.

21 Q. And has there been any testing of the
22 waste products of the third-party defendants?

23 A. You mean by USEPA?

24 Q. Yes, sir.

1 A. Yes.

2 2.

3 Well, during the removal action, there
4 was sampling during the RI/FS, there was
5 sampling of wastes at the site. And the
6 third-party defendants' wastes would have been
7 included in that sampling.

8 Q. Was there any other testing at the site
9 of the third-party defendants' location?

10 A. You mean as the wastes were transported
11 from the third-party defendants to the site?

12 Q. No.

13 This is after the fact, not wastes that
14 was brought to Midco.

15 Did anybody ever go to the third-party
16 defendants' sites and test their waste for their
17 composition?

18 A. Not that I know of.

19 Q. All the records that you have obtained
20 from the third-party defendant would be
21 contained in these records here, is that
22 correct, that you have brought here for your
23 deposition?

24 A. What we have here, we have the Dehart

1 documents from Dehart, and the documents from
2 Intec, at least photocopies of those records.

3 We didn't bring the 104 E responses
4 from all the third-parties for the defendants,
5 but those are available in USEPA's files.

6 Q. Okay.

7 MR. TENENBAUM: Just for the record I am not
8 sure whether all of the Dehart documents are
9 here.

10 BY MR. LUSTGARTEN:

11 Q. What documents do you have that show
12 the nature of the toxic waste produced by the
13 third-party defendants?

14 A. Okay?

15 Well, we have the Dehart and Intec
16 documents which I mentioned before. We have the
17 responses to 104 E requests. And we may have
18 other information in the depositions
19 transcripts.

20 Q. Do you have any knowledge --

21 A. Possibly permits and permit
22 applications.

23 Q. I am sorry.

24 A. And there may be other material, I'm

1 not sure. But, that is all I'm aware of.

2 Q. Do you have any knowledge concerning
3 negotiations by and between the government,
4 USEPA, and the third-party defendants?

5 MR. TENENBAUM: Any particular time?

6 A. What time?

7 MR. LUSTGARTEN: At any time, up until now.
8 Any negotiations for settlement of claims
9 relating to Midco.

10 MR. TENENBAUM: Other than the RI/PS?

11 MR. LUSTGARTEN: Yes.

12 A. You mean not including partial consent
13 decree in '85?

14 MR. LUSTGARTEN: That's right.

15 A. Yes.

16 Q. What third-party defendants have been
17 negotiating with the federal government, with
18 USEPA?

19 Strike the question.

20 MR. TENENBAUM: I don't know if there is any
21 attorney. I am not sure what he has in mind.

22 MR. LUSTGARTEN: Strike the question. Let
23 me rephrase it.

24 Q. Has USEPA made any settlements with the

1 third-party defendants other than the consent
2 decree?

3 A. On for Midco I and Midco II?

4 Q. Yes.

5 A. No.

6 There haven't been any settlements
7 other than the partial consent decree.

8 Q. Okay.

9 I think maybe this had been asked
10 sometime before, but I don't have the answer.

11 Who was the project manager before you?

12 A. Karen Waldvogel. W-a-l-d-v-o-g-e-l.

13 Q. One of the defendants, Bloomberg, was
14 eliminated from the second amended complaint.
15 Why?

16 MR. TENENBAUM: To the extent you are
17 seeking to ask question about the Agency's
18 exercise of prosecutorial discretion -- well,
19 let me think about this for a second.

20 MR. LUSTGARTEN: On the record.

21 MR. TENENBAUM: See what he says.

22 Go ahead.

23 BY MR. LUSTGARTEN:

24 Q. Okay.

1 Why was Bloomberg dropped from the
2 second amended complaint?

3 MR. TENENBAUM: Object.

4 BY MR. LUSTGARTEN:

5 Q. If you know?

6 A. I don't know.

7 Q. Who would know?

8 A. Counsel.

9 Q. And you are not going to tell me for
10 the record why Bloomberg was dropped?

11 MR. TENENBAUM: On the deposition of Mr.
12 Noice I'm not.

13 BY MR. LUSTGARTEN:

14 Q. All right.

15 Where are the records of US Scrap &
16 Drum for October 1975 and later?

17 A. What does this have to do with Midco?

18 Q. I don't know, but it could.

19 All I want to know is where they are.

20 A. Records for US Scrap and US Drum from
21 1975 onward?

22 Q. Yes, sir.

23 A. I don't know.

24 Q. Are they in the possession of USEPA?

1 A. I know we have records on US Scrap and
2 US Drum, but I don't know what time period they
3 are for.

4 Q. You know you have them, but you don't
5 know where they are?

6 A. No.

7 I said I don't know what the time
8 period for those records are.

9 Q. How would I obtain access to them, who
10 would I ask?

11 A. Other than a Freedom of Information Act
12 request you mean?

13 Q. Yes.

14 A. Well, that is a formal way, is to send
15 in a Freedom of Information Act request.

16 Q. Or request to produce?

17 A. I guess if it has relevance to this
18 case.

19 Q. Okay.

20 A. I guess you would contact Mike Berman.

21 Q. Do you have any knowledge of the
22 condition of the soil at the Midco sites I and
23 II before Dehart started his operations?

24 A. Based on the documents I have read you

1 mean?

2 Q. Yes.

3 A. I have some knowledge. Yes.

4 Q. What is that?

5 A. That knowledge would be contained in
6 the remedial investigation and feasibility study
7 and there's also some information in the
8 depositions, especially the Robinson deposition
9 regarding disposal at Midco II.

10 And we also have aerial photos of Midco
11 I and Midco II which might provide some
12 information.

13 MR. LUSTGARTEN: No further questions.

14 DIRECT EXAMINATION

15 BY MR. LEAHY:

16 Q. Mr. Boice, my name is Ed Leahy and I
17 represent Scholle Corporation who is a
18 third-party defendant here.

19 Do you have any facts or are you aware
20 of anyone in EPA that has facts indicating that
21 waste from Scholle Corporation was disposed of
22 at Midco I or Midco II?

23 A. Yes.

24 Q. Is that based on personal observations?

1 A. You mean was I on the site on observed
2 wastes coming into the site from Scholle
3 Corporation?

4 Q. Yes.

5 MR. TENENBAUM: Let me incorporate at this
6 point my similar objections that I made to the
7 liability-type questioning by the other
8 defendants, or the defendants, whatever.

9 MR. LEAHY: Okay.

10 A. No. I have never -- I wasn't on the
11 site during the Midco operations and I didn't
12 see any. So I didn't directly observe any
13 wastes from Scholle coming into the site.

14 Q. What is the basis for your information
15 regarding wastes brought into the sites by
16 Scholle?

17 A. It is based on documents available to
18 USRPA.

19 Q. What are those documents?

20 A. There is the Dehart and Intec
21 documents, which I have previously described.
22 Responses to 104 B information request.
23 Possibly information in depositions and
24 transcripts.

1 Q. Is that the only information you have?

2 A. Possibly permits and permit
3 applications.

4 Q. Are you aware of any permit or permit
5 applications for Scholle Corporation?

6 A. I'm not aware of any.

7 Q. If I can ask you if you can look into
8 your documents and if you find any applications
9 or permits regarding Scholle, if you can give me
10 a copy of those I would appreciate that.

11 MR. TENENBAUM: Will you give us a copy of
12 any you have?

13 MR. LEAHY: I would think so, if you
14 request it. Yes. If you have in your
15 discovery, I am sure we would.

16 Q. Do you have any information as to the
17 nature of the wastes brought on to the site by
18 Scholle Corporation?

19 A. You mean off the top of my head?

20 Q. Off the top of your head first.

21 A. No.

22 Q. Other than off the top of your head,
23 would you have any knowledge as to the nature of
24 the wastes brought in there by Scholle

1 Corporation?

2 A. I would have to review the documents.

3 Q. I have a couple more.

4 In response to questioning by Mr.
5 Lustgarten, you said that you know that there
6 was waste from third-party defendants brought on
7 to the site. Strike that question.

8 One last question.

9 In response to Mr. Lustgarten's
10 questions, you indicated that you have all the
11 original records of the Dehart and Intec
12 documents, copies are here but that you have the
13 originals.

14 Do you know if --

15 MR. LUSTGARTEN: I think he only said
16 Dehart. He doesn't have the original Intec
17 records.

18 A. I didn't say I didn't have, but you
19 only asked about Dehart.

20 MR. LUSTGARTEN: Right.

21 MR. TENENBAUM: We don't have originals of
22 those.

23 MR. LEAHY: The Dehart documents.

24 You have all the originals of the